(12)

No. 92-989-CSY
Status: GRANTED
CAPITAL CASE

Docketed:
December 7, 1992

Title: Tennessee, Petitioner
v.
Donald Ray Middlebrooks
and
Tennessee Jonathan Vaughn Evans

Court: Supreme Court of Tennessee,
Middle Division

Counsel for petitioner: Burson,Charles W.

Counsel for respondent: Barrett Jr.,Lionel R., Skelton,Mark A., Scheidegger,Kent S., Stebbins,David C.

NOTE: See mail label re dkt dt 121092 ck rec'd-121492 consulted Frank re dkt *Tennessee v. Jonathan Vaughn Evans, No. S.C. 36, 091492 (Sup. Ct. of TN, Eastern Div.)-FRANK note for conference

Entry	Date	Note	Proceedings and Orders
1	Dec 7 1992	P	Petition for writ of certiorari filed.
2	Jan 6 1993		Brief of respondent Donald Middlebrooks in opposition filed.
3	Jan 6 1993	G	Motion of respondent Middlebrooks for leave to proceed in forma pauperis filed.
4	Jan 13 1993		DISTRIBUTED. February 19, 1993
5	Feb 16 1993	P	Response requested -- WHR. (Due March 16, 1993)
7	Mar 10 1993	N	Motion of respondent Evans for leave to proceed in forma pauperis filed.
6	Mar 17 1993		REDISTRIBUTED. April 2, 1993
9	Apr 12 1993		REDISTRIBUTED. April 16, 1993
10	Apr 19 1993		Motion of respondent Middlebrooks for leave to proceed in forma pauperis GRANTED.
11	Apr 19 1993		The petition for a writ of certiorari as to Middlebrooks is granted.
			**********
12	May 12 1993	G	Motion of respondent Donald Ray Middlebrooks for appointment of counsel filed.
13	May 17 1993		REDISTRIBUTED. May 21, 1993
14	May 24 1993		Motion for appointment of counsel GRANTED and it is ordered that David C. Stebbins, Esquire, Nashville, Tennessee, is appointed to serve as counsel for the respondent Donald Ray Middlebrooks in this case.
16	May 24 1993		Record filed.
		*	Certified record proceedings Supreme Court of Tennessee, Middle Division (1 BOX)
17	Jun 3 1993		Brief of petitioner Tennessee filed.
18	Jun 3 1993	G	Motion of Appellate Committee of the California District Attorneys' Association for leave to file a brief as amicus curiae filed.
19	Jun 3 1993		Brief amicus curiae of Criminal Justice Legal Foundation filed.
20	Jun 3 1993		Brief amici curiae of California, et al. filed.
21	Jun 3 1993		Joint appendix filed.
22	Jun 28 1993		Motion of Appellate Committee of the California District

2pp

No. 92-989-CSY

Entry	Date	Note	Proceedings and Orders
			Attorneys' Association for leave to file a brief as amicus curiae GRANTED.
23	Jul 7 1993		Brief of respondent Donald Middlebrooks filed.
24	Jul 19 1993	D	Motion of respondent Donald Ray Middlebrooks to dismiss the writ for lack of jurisdiction filed.
27	Aug 4 1993		Motion to dismiss DISTRIBUTED. Sept. 27, 1993.
26	Aug 10 1993		Reply brief of petitioner Tennessee filed.
25	Aug 11 1993		Opposition of petitioner to motion of respondent to dismiss for lack of jurisdiction filed.
28	Sep 8 1993		CIRCULATED.
29	Sep 10 1993		SET FOR ARGUMENT MONDAY, NOVEMBER 1, 1993.(1ST CASE).
30	Oct 4 1993		Motion of respondent Donald Ray Middlebrooks to dismiss the writ for lack of jurisdiction DENIED.
31	Nov 1 1993		ARGUED.
32	Nov 17 1993	G	Motion of respondent for leave to file a supplemental brief after argument filed.
33	Nov 19 1993		Opposition of petitioner to motion of respondent for leave to file a supplemental brief after argument filed.
34	Dec 6 1993		Motion of respondent for leave to file a supplemental brief after argument GRANTED.

92-989

Supreme Court, U.S.
FILED
DEC 7 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS and
JONATHAN VAUGHN EVANS,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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WASHINGTON, D.C. 20543

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QUESTION PRESENTED

Whether, in a capital felony murder prosecution, the Eighth Amendment prohibits the sentencer from considering as an aggravating circumstance that the murder was committed in the perpetration of a felony?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. Respondent Donald Ray Middlebrooks 2

B. Respondent Jonathan Vaughn Evans 6

REASONS FOR GRANTING THE WRIT 9

A. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE STATE COURT DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT 9

1. The decisions of the Supreme Court of Tennessee are not in accord with the applicable decisions of this Court 9

2. The state court decided a federal question in holding that an aggravating circumstance cannot duplicate an element of the crime 13

3. The federal question in this case is not mooted or otherwise rendered unimportant by the 1989 change in the Tennessee felony murder statute 17

TABLE OF CONTENTS – Continued

Page

B. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE OPINION OF THE SUPREME COURT OF TENNESSEE CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OF THE FEDERAL COURTS OF APPEALS 17

C. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT'S CONSTRUCTION OF THE EIGHTH AMENDMENT IS OF GREAT IMPORTANCE TO ALL STATES WITH CAPITAL PUNISHMENT STATUTES .. 18

D. IN ANY EVENT, THIS COURT SHOULD HOLD THESE CASES PENDING THIS COURT'S DECISION IN *LOCKHART V. FRETWELL* 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES CITED

Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989) 18

Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988) 18

Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985) 15, 20, 21, 22

Enmund v. Florida, 458 U.S. 782 (1982)..... 10, 11, 13, 15

Furman v. Georgia, 408 U.S. 238 (1972)..... 9, 12, 13, 14

Lockhart v. Fretwell, No. 91-1393..... 20, 21, 22, 23

Lowenfield v. Phelps, 484 U.S. 231 (1988) ..... *passim*

Michigan v. Long, 463 U.S. 1032 (1983)..... 13, 14, 16

Perry v. Lockhart, 871 F.2d 1384 (8th Cir. 1989)....18, 22

Proffitt v. Florida, 428 U.S. 242 (1976)..... 10, 12, 13, 17

State v. Cherry, 298 N.C. 86, 257 S.E.2d 450 (1979) 14

State v. Smith, 755 S.W.2d 757 (Tenn. 1988) 15

Tison v. Arizona, 481 U.S. 137 (1987).....10, 11, 13, 14, 15

Zant v. Stephens, 462 U.S. 862 (1983) 10, 14, 17

STATUTES CITED

Tenn. Code Ann. § 39-2-202(a) ..... *passim*

No. _____

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS and
JONATHAN VAUGHN EVANS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

The petitioner, State of Tennessee, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the Supreme Court of Tennessee entered on September 8, 1992, and September 14, 1992.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee in *State v. Donald Ray Middlebrooks* filed on September 8, 1992, is designated for publication but has not yet been published. The opinion appears as Appendix "A". The opinion of the Supreme Court of Tennessee in *State v.*

Jonathan Vaughn Evans filed on September 14, 1992, is also designated for publication but has not yet been published. It appears as Appendix "B".

JURISDICTION

The judgment of the Supreme Court of Tennessee in *State v. Middlebrooks* was entered on September 8, 1992, and the judgment in *State v. Evans* was entered on September 14, 1992. This petition was filed within ninety (90) days of those dates.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Respondent Donald Ray Middlebrooks

Donald Ray Middlebrooks was indicted in September, 1987, by the Grand Jury for Davidson County, Tennessee, for the first-degree murder and aggravated

kidnapping of Kerrick Majors as well as the armed robbery and aggravated sexual battery of Majors. Trial commenced on September 15, 1989, and on September 19, 1989, the respondent was found guilty of murder in the first degree in the perpetration of a felony, to-wit, aggravated kidnapping. Tenn. Code Ann. § 39-2-202(a).[1] He was also found guilty of aggravated kidnapping. On September 22, 1989, after a sentencing hearing, the jury returned a verdict finding that the defendant should receive the death penalty. The jury found that two aggravating circumstances were present: (1) that the murder was heinous, atrocious or cruel in that it involved torture or depravity of mind; and (2) that it was committed while the defendant was engaged in committing a felony. Tenn. Code Ann. § 39-2-203(i)(5) and (7) (1982). The jury further found as required by the Tennessee statute, that the aggravating circumstances sufficiently outweighed the mitigating circumstances and sentenced the defendant to

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[1] At the time of respondent's conviction, the felony murder statute provided:

> [e]very murder perpetrated by means of poison, lying in wait, or by other kinds of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb. . . .

The Tennessee Legislature later amended the statute to provide that first-degree murder occurs only where a killing in the perpetration of one of the listed felonies is reckless. Tenn. Code Ann. § 39-13-202(a)(2) (1991).

death by electrocution. He was also sentenced to 60 years for aggravated kidnapping.

On September 8, 1992, upon automatic, direct review under Tenn. Code Ann. § 39-13-205(a), the Supreme Court of Tennessee affirmed respondent Middlebrooks' conviction but remanded the case for resentencing. A three-member majority of the court held that the "duplication" of the elements of felony murder required for the conviction and for application of the felony murder aggravating circumstance violated the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution because the statute applied in this manner did not sufficiently narrow the class of death-eligible defendants.

The facts surrounding respondent Middlebrooks' conviction and sentence of death establish his suitability for the death penalty.

On Sunday, April 26, 1987, around 7:00 p.m., 14-year-old Kerrick Majors was with friends in Nashville, Tennessee, when they noticed a flea market which had been set up by three homeless persons: the respondent, his wife and Roger Brewington. As the boys approached the flea market, the respondent's wife called out, "Hey, leave our stuff alone!" The boys started running, chased by the respondent and Brewington. They caught Majors. His friends watched as Majors was dragged into a wooded area.

The next day Majors' nude body was discovered behind the area where the respondent and Brewington had caught Majors. There was a blood-stained tee shirt around his neck, a belt around his wrists and a two-inch

laceration on his wrist. There were numerous abrasions, swellings and bruising on the victim's head, eye, nose, lips and inside his mouth. An "X" with a vertical line running through it had been carved into his chest. These incisions were made while Majors was alive. There were two deep stab wounds in the center of his body, one of which caused the victim to bleed to death over a period of ten to thirty minutes while he would have been conscious. There was the smell of urine about the victim's face and there were bruises and skinned areas on his back. A wooden stick with blood stains on one end was found lying close to the victim's head.

As a result of information gleaned from the police investigation, the respondent was arrested and gave a lengthy video taped statement about his involvement. The respondent admitted beating and assisting in Majors' torture although he tried to maintain that his role was minor. According to respondent's statement, Brewington slapped the victim, beat him with brass knuckles, hit him with a stick and urinated in his mouth. Respondent admitted striking the victim with his open hand and with a switch. He maintained that his wife slapped the victim and burned the victim's nose with a cigarette lighter. He said that Brewington hit the victim on his testicles and threatened to cut "it" open, stuck a stick up the victim's anus, beat the victim and slashed his wrists. Respondent and Brewington, who are white, also repeatedly hurled racial slurs at Majors, who was black. Respondent maintained that he asked Brewington to stop because the victim's crying and pleading were getting on his [respondent's] nerves. Brewington then gave the victim the "kiss of death" on the forehead. Brewington gave respondent

the knife and told him to stab Majors. Respondent maintained that he refused and that Brewington stabbed Majors. However, respondent admitted that he then stabbed the victim to "prove to Roger that I guess I was cooler" and to put the victim out of his misery. However, in a prior statement, respondent said that he indeed stabbed Majors twice. The victim's ordeal of torture began with his kidnapping at 7:30 p.m. and ended with his death at 11:00 p.m.

At the sentencing phase of the trial, the State incorporated the evidence presented at the guilt phase and introduced photographs of the victim's body. Respondent attempted to convince the jury that he was mentally ill.

B. Respondent Jonathan Vaughn Evans

Respondent Evans was tried by a jury in the Criminal Court for Hamblen County, Tennessee, for the first degree murder of Mary Slover. The trial commenced on December 12, 1989, and on December 15, 1989, the jury returned a verdict finding respondent Evans guilty of first-degree murder in the perpetration of a felony. Following a sentencing hearing, the jury unanimously found beyond a reasonable doubt the following statutory aggravating circumstances applicable: (1) the murder was committed with the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant, and (2) the murder was committed while the defendant was engaged in committing or attempting to commit or was fleeing after committing or attempting to commit a robbery. Tenn. Code Ann. § 39-2-203(i)(6) and (7). The

jury determined that the aggravating circumstances outweighed any mitigating circumstances offered by respondent Evans and imposed the death penalty.

On September 14, 1992, upon automatic, direct review pursuant to Tenn. Code Ann. § 39-13-205(a), the Supreme Court of Tennessee affirmed respondent Evans' conviction but remanded the case for resentencing. In reversing respondent Evans' death sentence a majority of the Supreme Court of Tennessee relied upon its opinion in the case of *State v. Middlebrooks*, in which the same majority held that the use of the aggravating circumstance in Tenn. Code Ann. § 39-2-203(i)(7) to impose a sentence of death in cases of felony murder violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution.

The evidence presented at the guilt phase of the trial established that Mary Slover, a grocery store clerk, was murdered on the morning of February 5, 1989, shortly before 8:00 a.m. during a robbery at a By-Lo Market in Morristown, Tennessee. Respondent Evans, having worked at the By-Lo from January through July of 1988, knew the victim and also knew the combination to the safe. (R., VII, 443-453).

Respondent Evans and his car were observed in the By-Lo parking lot between 7:50 and 7:55 a.m. (R., V, 290-291; VI, 323-325, 343-344, 350). Shortly before 8:00 a.m., a witness saw respondent Evans driving at a high rate of speed away from the By-Lo area. (R., VI, 372-379). Mary Slover was found dead by customers at approximately 8:10 a.m., lying face-up in a back aisle of the store, next to the safe, with her head in a pool of blood.

(R., VI, 392-393). The autopsy revealed a single gunshot wound in the back of her head fired from a .25 caliber automatic pistol. (R., IX, 795-796).

Later that day a blue bank bag and telephone receiver, taken from the market, and a .25 caliber pistol were seen in respondent Evans' car. (R., VIII, 554, 583-586; IX, 608, 630). A month earlier, a gun belonging to respondent Evans' landlady was reported missing; about this time, respondent Evans gave his girlfriend a similar gun. (R., VIII, 545; XI, 872). Ballistic examinations revealed that the bullet removed from Mary Slover's head was fired from the landlady's missing gun. (R., XI, 780-784, 834, 865; XII, 931-939, 949-950, 973-977). Respondent Evans was seen with a large amount of cash after the market robbery and murder. (R., IX, 627-629, 638-640, 646, 655-656, 659-660; XI, 875-876).

At the sentencing phase of the trial, the State relied upon the evidence presented at the guilt phase of the trial in support of the aggravating circumstances. (R., XIV, 1135-1136). Respondent Evans' presented the testimony of several witnesses regarding his childhood and educational background. (R., XIV, 1137-1229).

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE STATE COURT DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

1. The decisions of the Supreme Court of Tennessee are not in accord with applicable decisions of this Court.

The decisions of the Supreme Court of Tennessee in these two cases erroneously conclude that Tennessee's death penalty statute fails to adequately narrow the class of death-eligible defendants where a defendant is convicted of felony murder and one of the aggravating circumstances found by the jury in the sentencing phase is a felony murder aggravating circumstance. The court concluded that this duplication violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution because there is insufficient narrowing of those eligible to be sentenced to death. The majority of the Supreme Court of Tennessee opined that the result is a violation of *Furman v. Georgia*, 408 U.S. 238 (1972), because the jury is given unfettered discretion to determine who would receive the death penalty and who would not. Quite clearly, this is an erroneous interpretation of *Furman*. *Furman* requires that the sentencer's discretion be directed, limited and exercised in an informed manner so as to avoid the arbitrary and capricious imposition of the death penalty. Indeed, "the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring the examination of specific factors that argue in

favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976).

The concept of "narrowing" contained in the majority opinion of the Supreme Court of Tennessee is not found in *Furman* nor in any other opinion of this Court. Rather, where the statutory scheme includes aggravating circumstances which are not unconstitutionally vague so as to adequately channel the jury's sentencing decision, capital punishment may be imposed without violating the Eighth Amendment. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). This Court has explicitly held that there is no Eighth Amendment prohibition against using an element necessary for conviction as an aggravating circumstance to support the imposition of the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

The Supreme Court of Tennessee also misinterpreted this Court's opinions in *Tison v. Arizona*, 481 U.S. 137 (1987), and *Enmund v. Florida*, 458 U.S. 782 (1982). The Supreme Court of Tennessee essentially held that *Tison/Enmund* provides a base line from which the statutory scheme must narrow all felony murders to those felony murders eligible for the death penalty. In so doing, the Tennessee Supreme Court erroneously distorted the relationship between the Eighth Amendment concepts of "narrowing" and "proportionality". The issue in *Tison* (and *Enmund*) was whether the death penalty was a proportional punishment under the Eighth Amendment for certain types of felony murder. This Court in *Tison* concluded that imposition of capital punishment in a felony murder case does not violate the Eighth Amendment if

the defendant killed, intended to kill or acted with reckless indifference to the possibility that his victim would in fact die. *Tison* did not involve, and in fact did not even mention, the concept of "narrowing" relied upon by the Tennessee Supreme Court. The Tennessee Supreme Court did not find that the death penalty was disproportionate in these cases. Indeed, given Respondent Middlebrooks' confession that he was present and participated in the torture and killing of his victim and evidence that Respondent Evans pulled the trigger killing his victim, no such finding would be possible.

In *Middlebrooks*, the Supreme Court of Tennessee concluded that the state statutory scheme is coextensive with the proportionality standard for felony murder set out in *Tison*. From that conclusion, the court erroneously extrapolated that the class of persons eligible for the death penalty had not been sufficiently narrowed. This conclusion is erroneous since, if the *Tison* standard is met, death is a proportional punishment for felony murder as defined by Tennessee's statute and Tennessee's statute therefore necessarily narrows the class of *all* felony murders into a subset of those who truly deserve the punishment of death. The Supreme Court of Tennessee seriously misinterpreted *Tison* and *Enmund* as holding that the Eighth Amendment required a statutory definition of capital murder which would narrow the set of all felony murders *who meet the Eighth Amendment standard as set out in Tison* into yet another subset of felony murders. This is not required by the constitution or any opinion of this Court. Rather, the constitution simply requires that a statutory scheme define capital murder in a way that

narrows the set of all murders into a subset of those that truly deserve the imposition of the death penalty.

The Supreme Court of Tennessee also erred in looking only at the single aggravating circumstance in determining whether there was sufficient narrowing to satisfy the constitution. Aggravating factors are but one portion of the sentencing scheme. *Furman* requires that the system *as a whole* provide a narrowing function. The system must be examined as a whole. In Tennessee, the jury's discretion is channeled by virtue of the requirement of a bifurcated proceeding, consideration of mitigating factors and the direction which the jury receives with regard to how to weigh the various sentencing factors. In addition, Tennessee's statute requires that the appellate court review all cases in which the death penalty is sought to ensure that the death penalty is not imposed in an arbitrary and capricious manner. All of these statutory safeguards work together to ensure that the jury is not given unfettered discretion to determine who lives and who dies.

In *Proffitt v. Florida*, *supra*, 428 U.S. at 258 (1976), this Court held that the *Furman* requirements are "satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." In *Proffitt*, this Court implicitly approved the application of the death penalty where the defendant was found guilty of felony murder and felony murder was also used as an aggravating circumstance. This Court further held that Florida's capital sentencing scheme satisfied the constitutional requirements

set out in *Furman*, *supra*. Tennessee's statute is based largely upon the Florida statute and is almost identical to it. Clearly, the Tennessee Supreme Court's decision conflicts with *Proffitt*, *supra*, and misinterprets this Court's opinions in *Tison*, *Enmund* and *Lowenfield*.

2. The state court decided a federal question in holding that an aggravating circumstance cannot duplicate an element of the crime.

The opinion of the Supreme Court of Tennessee cites both the federal and state constitutions in determining that the imposition of the death penalty in this case was unconstitutional. This Court has jurisdiction to entertain this matter since it is impossible to conclude that the Tennessee Supreme Court's decision rested on an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032 (1983).

Indeed, from the face of the opinion, it appears that the Tennessee Supreme Court's holding was compelled by its erroneous interpretation of the Eighth Amendment. The majority opinion intermingles its reliance upon the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution in several places.[2] Further evidence of the intermingling of

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[2] "We hold that . . . [Tennessee's statute] does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the United States Constitution, and Article I, Section 16 of the Tennessee Constitution . . . " (Appendix, at A2 and A63); "We therefore reverse the sentence on the grounds that the aggravating circumstance . . . is unconstitutionally applied under the Eighth Amendment to the U.S. Con-

state and federal law is found in the court's extremely heavy reliance on the decisions of this Court interpreting the Eighth Amendment. The court relied heavily on *Lowenfield v. Phelps, supra, Furman v. Georgia, supra, Tison v. Arizona, supra,* and *Zant v. Stephens, supra,* as well as other decisions from this Court in reaching its conclusion. The court also relied on *State v. Cherry,* 298 N.C. 86, 257 S.E.2d 450 (N.C. 1979), in which the North Carolina Supreme Court invalidated that state's statute which prohibited similar duplication. It is unclear whether the Supreme Court of North Carolina based its decision on the federal or state constitution or on statutory interpretation. In any event, that opinion predates this Court's decision in *Lowenfield v. Phelps, supra,* and thus was rendered without this Court's guidance on the federal constitutional issue involved.

In *Michigan v. Long, supra,* the Court held that where state and federal law is intermingled, there must be a "plain statement" in the opinion to indicate that independent state law controls the court's decision. *Id.*, at 1040. This Court will presume jurisdiction where it is evident that the state court reached its conclusion because it believed it had to under federal law and where there is no plain statement to the contrary.

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stitution and Article I, Section 16 of the Tennessee Constitution." (Appendix, at A3); "[a] corollary to the general argument is that imposing the death penalty for felony murder is not constitutional in that Tennessee's death penalty statute does not sufficiently narrow the population of death-eligible defendants under the Eighth Amendment to the U.S. Constitution, and Article I, Section 16 of the Tennessee Constitution." (Appendix, at A48).

In this case, it is quite clear that the Supreme Court of Tennessee felt compelled to conclude that the use of the felony murder aggravating circumstance where the defendant was convicted of felony murder is unconstitutional because of its erroneous interpretation of *Tison, Enmund* and *Lowenfield*. The court's erroneous interpretation of those cases compelled the conclusion that there must be additional narrowing after the *Tison* standard has been met in order for the Eighth Amendment to be satisfied.

Since there is joint reliance on the federal and state constitutions and the opinion makes it clear that the state court believed the statute was unconstitutional under federal law, this Court has jurisdiction.

Further, the Supreme Court of Tennessee did not clearly assert at any point in its opinion that the state constitutional protections were greater than those found in the federal constitution.

The opinion in *Middlebrooks* mentions the Tennessee Constitution on only two occasions without also citing to the federal constitution. In one instance, the court writes that it had previously refused to follow the Eighth Circuit's holding in *Collins v. Lockhart,* 754 F.2d 258 (8th Cir. 1985), finding the *Collins* rationale "inapplicable under the Tennessee Constitution." (Appendix, at A61). The court cites its prior opinion in *State v. Smith,* 755 S.W.2d 757 (Tenn. 1988), in support of this statement. The *Smith* opinion is, however, explicitly based on the Tennessee court's interpretation of federal law, and the contrary conclusion in *Middlebrooks* is due to the Tennessee Court's interpretation of *Lowenfield's* application of federal constitutional law. The remaining solitary reference to the Tennessee Constitution, that "duplication in capital

sentencing is prohibited," (Appendix, at A50), is clearly premised upon the court's misguided definition of "unconstitutional duplication", and that misguided definition is based entirely on the court's misreading of *Lowenfield, Tison* and other cases from this Court. Indeed, nowhere does the court set out any analysis of this issue under the Tennessee Constitution. This stands in marked contrast to the court's earlier discussion of whether the imposition of the death penalty for felony murder is a per se violation of the Tennessee Constitution. After thoroughly discussing the applicable state constitutional provision and prior cases on the subject, the court very clearly holds that no violation exists under state law. (Appendix, at 33-48).

Thus, the opinion demonstrates heavy reliance on federal law and contains no indication that the state constitutional protections are greater than those afforded by the federal constitution. A fair reading of the opinion demonstrates that the court felt compelled by its interpretation of the federal constitution and *Tison, Enmund* and *Lowenfield* to declare the use of this aggravating circumstance under these facts unconstitutional under both the state and federal constitutions. Where, as here, there is an intermingling of state and federal law and it is clear that the court felt compelled to reach its decision based upon federal law, this Court should presume that the state court based its decision on federal law. *Michigan v. Long, supra,* at 1041. Since nowhere in the opinion did the Supreme Court of Tennessee expressly state that its citation to federal law was for guidance only or that it did not feel compelled to follow federal law, this Court has jurisdiction to review the decision.

3. The federal question in this case is not mooted or otherwise rendered unimportant by the 1989 change in the Tennessee felony murder statute.

As noted by the Supreme Court of Tennessee, the Tennessee felony murder statute was amended in 1989 to require recklessness as an element of felony murder. The change became effective after the trials in these cases. The Tennessee Supreme Court's erroneous Eighth Amendment interpretation was not rendered moot or unimportant by the statutory change, however; rather, the Tennessee Supreme Court expressly stated that its decision would be exactly the same under either the pre-1989 or post-1989 version of the Tennessee statute. *See Middlebrooks*, Appendix, at A57.

B. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE OPINION OF THE SUPREME COURT OF TENNESSEE CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OF THE FEDERAL COURTS OF APPEALS.

The Supreme Court of Tennessee's interpretation of the Eighth Amendment requirements for "narrowing" implicitly conflicts with this Court's decision in *Proffitt v. Florida, supra,* as discussed in subsection A of this argument. Further, it implicitly conflicts with this Court's decision in *Zant v. Stephens, supra,* which held that a statutory scheme passes constitutional muster with regard to its "narrowing" as long as there are aggravating circumstances to channel the jury's discretion if those aggravating circumstances are not so vague that they fail to adequately channel the sentencer's discretion. Clearly,

the decision of the Supreme Court of Tennessee also conflicts with *Lowenfield v. Phelps, supra*, which held that it was not a violation of the Eighth Amendment for a jury to consider an aggravating circumstance which contained a necessary element of the crime for which the defendant had already been convicted.

Additionally, there are decisions from at least three circuits of the United States Court of Appeals which have specifically held that there is no violation of the Eighth Amendment where a felony murder aggravating circumstance is employed when a defendant has been found guilty of felony murder. *See Byrne v. Butler*, 845 F.2d 501, 515 fn. 12 (5th Cir. 1988); *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989); *Bertolotti v. Dugger*, 883 F.2d 1503, 1527-1528 (11th Cir. 1989). Thus, this Court should grant certiorari because there is a conflict between the decision of the Supreme Court of Tennessee and prior cases of this Court and the federal courts of appeals.

C. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT'S CONSTRUCTION OF THE EIGHTH AMENDMENT IS OF GREAT IMPORTANCE TO ALL STATES WITH CAPITAL PUNISHMENT STATUTES.

This Court should grant certiorari because the issue presented is one of grave importance to the State of Tennessee and to all states which have capital punishment statutes.

As indicated in the concurring and dissenting opinion authored by Justice Frank Drowota, at least one-third of the ninety-nine persons currently on death row in

Tennessee may be affected by the decision of the Supreme Court of Tennessee in this case.[3] Thus, a great many death-sentenced defendants will be affected by the Tennessee Supreme Court's erroneous interpretation in *Middlebrooks* of this Court's opinions.

This issue is of great importance to many other states with capital sentencing schemes that permit the death penalty for felony murder and also permit the jury to consider that the murder was committed during a felony as an aggravating circumstance. Some nineteen states currently fall within this category.[4] Further, just weeks after the Supreme Court of Tennessee issued its opinion in *Middlebrooks*, the case was being urged upon this Court by a death-sentenced respondent for the proposition that the *Lowenfield* decision applies only where the narrowing occurs during the definitional phase. *See* Brief for

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[3] The number referred to in the concurring and dissenting opinion is based only on opinions reviewed and released by the court. The petitioner would contend that in fact the number of persons currently on Tennessee's death row who will be affected by the case is actually much greater than one-third and could impact as many as 48 defendants with death sentences in Tennessee.

[4] Of these states, eight include a greater *mens rea* requirement for the imposition of felony murder than Tennessee did at the time of Middlebrooks' conviction. Ten have no specific *mens rea* requirement in their statute. One state requires a standard of reckless indifference or something akin to it. The majority opinion of the Supreme Court of Tennessee indicates that its decision would not be any different if the statute under which Middlebrooks was convicted included a "reckless endangerment" requirement, as is now included in Tennessee law, since the court was of the opinion that this would not sufficiently narrow the class of death-eligible defendants either.

Respondent, *Lockhart v. Fretwell*, No. 91-1393, at 24. The misinterpretation of federal law found in the opinion of the Supreme Court of Tennessee is likely to be urged by many death-sentenced defendants in other state and federal courts. While it might be hoped that other courts will reject the reasoning of *Middlebrooks*, the possibility for the case causing mischief by misleading some of these courts into the same erroneous conclusion is great.

Finally, the opinion is of great importance to all states with death penalty statutes, not just those with the potential "duplication" problem found in *Middlebrooks*. In its opinion, the Supreme Court of Tennessee said that *Tison, supra*, places a "threshhold of culpability at the reckless indifference level," such that only defendants who act with reckless indifference may be eligible for the death penalty under the constitution. The court then concludes, "[S]ince the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants." (Appendix, at A59). This astonishing conclusion, in addition to coınpelling the erroneous holding that to use the felony murder aggravator under these circumstances is unconstitutional, has the potential for doing great mischief to many aggravating circumstances. Under this reasoning, anytime this Court finds that any aggravating circumstance sufficiently narrows the class of death-eligible defendants so as not to offend the Eighth Amendment, states must further narrow the class to yet a smaller subset in order to "meaningfully further narrow the class of death-eligible defendants". Clearly, there is no requirement that the aggravating circumstance be any "further" narrowed in

order to pass constitutional muster. This misinterpretation of federal constitutional law could potentially affect any aggravating circumstance contained in any state statutory scheme. Thus, this Court should grant certiorari in order to settle this important question of law.

D. IN ANY EVENT, THIS COURT SHOULD HOLD THESE CASES PENDING THIS COURT'S DECISION IN *LOCKHART V. FRETWELL*.

The central issue in these cases, namely, whether the Eighth Amendment is violated by the State's use of an aggravating circumstance of "commission of murder during a felony" in a case where the defendant was convicted of felony murder, is the same as the underlying legal issue in *Lockhart v. Fretwell*, No. 91-1393. Thus, at the very least, a hold pending this Court's decision in *Fretwell* is appropriate.

In *Fretwell*, the Eighth Circuit had held, at the time of Fretwell's trial and direct appeal, that use of a felony-murder aggravating circumstance in a case where the defendant was convicted of felony murder violated the Eighth Amendment. *See Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985). Fretwell's defense attorney did not challenge the use of the felony-murder aggravating circumstance in Fretwell's case. Fretwell now argues that his attorney thereby rendered ineffective assistance of counsel in violation of Fretwell's Sixth Amendment rights, even though the Eighth Circuit has since concluded that

Collins was wrongly decided, and that the Eighth Amendment does not bar the use of such an aggravating circumstance. *See Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989), *citing Lowenfield v. Phelps*, 484 U.S. 231 (1988).

Although the grant of certiorari in *Fretwell* did not clearly indicate that the underlying legal issue, i.e., the validity of the Eighth Circuit's *Collins* decision, would be the subject of debate in this Court, the parties in *Fretwell* have chosen to address the underlying legal issue in their briefs and in the oral arguments in this Court. For example, in Fretwell's brief, Fretwell devotes almost eleven pages to arguing the continuing validity of *Collins*, and the corresponding invalidity of *Perry*. In fact, Fretwell relies expressly on the Tennessee Supreme Court's decision in *Middlebrooks* as support for the proposition that *Lowenfield* does not apply to the Arkansas death penalty scheme. *See* Brief for Respondent, *Lockhart v. Fretwell*, No. 91-1393, at 24. Arkansas, in its reply brief in *Fretwell*, specifically waives any procedural bar defenses to this Court's consideration of the underlying legal issue, and devotes virtually the entire reply brief to addressing the validity of *Collins*. Arkansas also discusses extensively the Tennessee Supreme Court's decision in this case, concluding that it was wrongly decided. *See* Reply Brief for Petitioner, *Lockhart v. Fretwell*, No. 91-1393, at 7-8.

Given the presence of the identical issue that underlies the ineffective assistance of counsel claim in *Lockhart v. Fretwell*, this Court should hold these cases pending its decision in *Fretwell*. If this Court rules in *Fretwell* that *Collins* was wrongly decided, and that *Lowenfield* applies to Arkansas, then this Court should vacate the Tennessee Supreme Court's decision in these cases and remand for

further proceedings. If, however, this Court does not reach the *Lowenfield* issue in *Fretwell*, certiorari should be granted in these cases.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Plaintiff/Appellee, VS. DONALD RAY MIDDLEBROOKS, Defendant/Appellant.	FOR PUBLICATION Filed: September 8, 1992 DAVIDSON CRIMINAL HON. ANN LACY JOHNS, JUDGE No. 01-S-01-9102-CR-00008

For Appellant:	For Appellee:
Lionel R. Barrett,Jr. Richard McGee Paul G. Whetstone Nashville, Tennessee	Charles W. Burson Attorney General & Reporter and Kathy M. Principe Assistant Attorney General Nashville, Tennessee

OPINION

CONVICTION AFFIRMED;
SENTENCE REVERSED AND
REMANDED FOR RE-SENTENCING.[1] ANDERSON, J.

In this capital case, the defendant, Donald Ray Middlebrooks, was found guilty of first-degree felony murder and aggravated kidnapping, but found not guilty of premeditated first-degree murder, armed robbery, and aggravated sexual battery. In the sentencing hearing, the jury found two aggravating circumstances: (1) that the murder was heinous, atrocious or cruel in that it involved

torture; and (2) that it was committed while defendant was engaged in committing a felony. Tenn. Code Ann. § 39-2-203(i)(5) and (7) (1982). The jury found the aggravating circumstances sufficiently substantial to outweigh the mitigating circumstances and sentenced the defendant to death by electrocution. The defendant was also sentenced to 60 years for aggravated kidnapping.

On appeal, the defendant raises numerous issues for our review, which involve alleged errors occurring at trial in both the guilt and sentencing phases. We have carefully considered the defendant's contentions as to the guilt phase and find no error. We, therefore, affirm the defendant's guilt.[1] With respect to the sentence, we wish to address an issue not directly raised by the parties – the constitutionality of the death penalty as punishment for felony murder. A majority of the Court – Justices Anderson, Drowota, and O'Brien – conclude that it is constitutional under both the state and federal constitutions to impose the death penalty for felony murder under Tennessee's death penalty statute. Justices Daughtrey and Reid dissent. A majority of the Court – Justices Anderson, Daughtrey, and Reid – have determined, however, that

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[1] This Opinion has been divided into three parts for easier reference. The three parts are: Part I, "Guilt Phase – Trial Errors," found on page 10 of the Opinion: Part II "Constitutionality of the Death Penalty for Felony Murder," found on page 36 of the Opinion; and Part III, "Sentencing Phase – Constitutional Application of Aggravating Circumstances," found on page 51 of the Opinion. All Justices concur in Part I of the Opinion. Justices Anderson, Drowota, and O'Brien concur in Part II of the Opinion, and Justices Reid and Daughtrey dissent. Justices Anderson, Daughtrey, and Reid concur in Part III of the Opinion, and Justices O'Brien and Drowota dissent.

the statute as applied in this case does not sufficiently narrow the population of death-eligible felony murder defendants under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution, because the aggravating circumstance set forth in Tenn. Code Ann. § 39-2-203(i)(7) (1982), that the defendant was engaged in committing a felony, essentially duplicates the elements of the offense of first-degree felony murder set out in Tenn. Code Ann. § 39-2-202(a) (1982) and Tenn. Code Ann. § 39-2-202(a)(1) (Supp. 1988). Justices Drowota and O'Brien dissent.

As a result of this determination and because the jury has found two aggravating circumstances are supported by the evidence beyond a reasonable doubt, it is necessary for this case to be remanded for resentencing. Although the evidence amply supports the aggravating circumstance found by the jury that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn. Code Ann. § 39-2-203(i)(5), we are unable to conclude that the elimination of the other aggravating circumstance (i)(7) from jury consideration is harmless error beyond a reasonable doubt. We, therefore, reverse the sentence on the grounds that the aggravating circumstance set out in Tenn. Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder, and remand this case for a resentencing hearing, in which the State will be free to reseek the death penalty if it so desires.

Under our holding today, felony murder continues as a death-eligible offense. It requires, however, a finding of

one of the eleven other aggravating circumstances other than the duplicative circumstance of Tenn. Code Ann. § 39-2-203(i)(7).

FACTUAL BACKGROUND

The State's proof introduced at the guilt phase of the trial demonstrated that on the evening of Sunday, April 26, 1987, around 7:00 p.m., the victim, Kerrick Majors, a 14-year-old black male, was with four friends on Gallatin Road in East Nashville, Tennessee, when they saw a table with a "lot of stuff" being set up across the street as a flea market by three homeless street persons: the defendant, Donald Middlebrooks (a 24-year-old white male); his wife 17-year-old Tammy Middlebrooks; and their companion, 16-year-old Roger Brewington. The five boys ran across Gallatin Road and were looking at the flea market when Tammy Middlebrooks called out, "Hey, leave our stuff alone!" The boys started running. The defendant and Brewington chased them until they caught Majors. Brewington grabbed Majors in a "sleeper hold" around his neck and head. The defendant held his hand. When Majors said, "Hey man, you know me," Brewington responded, "Shut up, you nigger." Shannon Stewart and another of the boys, Tony Watson, saw the two men drag Majors toward the table and observed the defendant strike him in the face, knocking him to the ground. Frightened, the boys took off running. Later that evening, they reported these events to the victim's mother, who called the police.

The next afternoon, Kerrick Majors' nude body was discovered lying face up in a dry creek bed under a foam

mattress in a heavily wooded area behind a drugstore on Gallatin Road in the area where the defendant and Brewington had caught Majors. A bloodstained T-shirt was tied around his neck. A red rope belt was tied around Majors' left wrist, and there was a two-inch laceration in his right wrist. Abrasions, swelling, and bruising were present on the victim's head, his left eye, his nose, his lips, and inside his mouth. An "X" with a vertical line running through it had been cut into his chest. The forensic pathologist, Dr. Charles Harlan, testified that these incisions had been made while Majors was alive. There were two deep stab wounds in the center of the body. One of these penetrated the left lung and pulmonary artery and caused the victim to bleed to death over a period of ten to thirty minutes, during part of which Majors was conscious. Investigating officers noticed a smell of urine about the face, and there were bruises and skinned areas on the back. A wooden stick with blood stains on one end was found lying close to the victim's head.

Around 1:10 a.m. on April 28, police investigators met Brewington at a doughnut shop several miles from the Gallatin Road area. Brewington directed the officers to the location of a knife with a brass knuckle handle, which was bloodstained. Dr. Harlan testified that this knife could have inflicted the deep stab wounds on the victim's body. Brewington also directed the police to a wooded area between Gallatin Road and Ellington Parkway in Nashville where, around 7:00 a.m. on April 28, Donald and Tammy Middlebrooks were apprehended at a small plywood shack. The defendant, who resisted the arresting officers, had a knife with him. He was arrested

with the aid of police dogs, taken to the hospital for treatment of the dog bites, and later transported to police headquarters.

At 12:30 p.m. that day, the defendant gave a lengthy video-taped statement about his involvement in the death of Kerrick Majors. The defendant admitted participating in the beating and mistreatment of Majors, but described his role as minor and depicted Roger Brewington as the primary perpetrator of the offense. After Majors was caught, Middlebrooks said Brewington suggested they "have some fun," and the three of them took Majors back into the woods. His hands were tied. Brewington slapped him, beat him with the knife's brass knuckles, hit him with a stick, and urinated into his mouth. The defendant admitted striking Majors with his open hand and on the leg with a switch. Defendant said that his wife Tammy had slapped Majors and burned Majors' nose with a cigarette lighter as Brewington urged her on. Brewington hit Majors on his testicles, threatened to cut "it" open, stuck a stick up Majors' anus, hit him some more with the brass knuckles, wiped the victim's blood on himself, beat his mouth and tongue with a stick, dropped the knife on him, gagged him, and slashed his wrist. Finally, when the defendant asked Brewington to stop because the victim's crying and pleading were getting on his nerves, Brewington gave the victim "the kiss of death" on the forehead. Brewington then gave the defendant the knife and told him to stab Majors. When the defendant refused, Brewington stabbed Majors. The defendant then reluctantly stabbed the victim, according to him, "to prove to Roger that I guess I was cooler" and to put Majors out of

his misery. In a previous statement, however, the defendant had said that he had stabbed Majors twice. The victim's ordeal began at 7:30 p.m. and ended at 11:00 p.m. that night with the stabbing.

The next day, the defendant said he and Brewington went back to where they had left the body. Brewington kicked it and made the "X" lacerations at this time. The defendant said he then covered Majors with a foam mattress. The defendant admitted that before beating and killing Majors, he and Brewington had drunk alcohol and smoked marijuana.

The defendant presented no proof.

Based on this evidence, the jury found the defendant guilty of first-degree murder in the perpetration of a felony and aggravated kidnapping, but not guilty of premeditated first-degree murder, armed robbery, or aggravated sexual battery.

In the sentencing phase of the trial, the state incorporated the evidence presented at the guilt phase and introduced photographs of the victim's body and of Roger Brewington. The defendant's main theory was that he was mentally ill and that infliction of prolonged torture like that perpetrated on the victim was inconsistent with his personality. His younger half-sister, Sharon Fuchs, described their deprived and unstable childhood growing up in Texas. According to her, the defendant's father had died when he was four, and he had been subjected to mistreatment by his mother's husbands and boyfriends. The crucial change in his personality, however, had occurred after he was sodomized in his early teens by an adult male cousin who had been baby-sitting him and his

sister. After that, his grades dropped at school, he began to run away from home, and becoming emotionally disturbed, was committed to the Waco State Home for Children but ran away from that institution. Eventually, defendant was imprisoned for his role in stealing a combine. While confined, he was stabbed in the head with an ice pick. He then began having grand mal seizures. The defendant had a history of admissions to mental hospitals and mental health facilities in Texas. His sister described him as passive and nonviolent and related how they had been cared for by a black woman, whom the defendant had loved. She said her brother had had black friends and was not a racist.

In Fuchs' cross-examination, the state introduced a document written by Middlebrooks entitled "Debow's Revenge," in which the defendant listed Texas law enforcement officers upon whom he planned vengeance for their offenses against him. In a section called "Justified Death Plan," the defendant described the tortures he intended to inflict upon these persons. Fuchs explained that the document was written after the defendant had been released in May 1986 from the Austin State Hospital, where he had been undergoing psychiatric treatment, and testified that her brother had never acted on the threats in the document.

Dr. Jay Woodman, a clinical psychologist, also testified that he had interviewed, tested, and evaluated the defendant. He diagnosed the defendant as suffering from a severe borderline personality disorder, with a secondary diagnosis of an adjustment disorder with depressed mood, malingering, polysubstance abuse, antisocial personality disorder, and a seizure disorder by history. Dr.

Woodman described the defendant as a passive follower, impulsive, and unable to engage in inflicting torture for any protracted period of time. Dr. Woodman said the defendant's intelligence was in the low-average category, and that he had reviewed "Debow's Revenge" and thought that it was consistent with the fantasies generated by the intense inner-personal anger of someone suffering from a borderline personality disorder. Dr. Woodman felt that with the proper medication, the defendant could behave in the structured environment of a prison if given a life sentence.

Based on the proof, the jury found the existence of two aggravating circumstances beyond a reasonable doubt. The jury found that (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn. Code Ann. § 39-2-203(i)(5) (1982), and that (2) the murder was committed while the defendant was engaged in committing a felony, Tenn. Code Ann. § 39-2-203(i)(7) (1982). In additon, the jury found that the two aggravating circumstances outweighed the mitigating circumstances. As a result, the jury sentenced the defendant to death.

PART I.

GUILT PHASE - TRIAL ERRORS

A. Motion To Suppress Confession

The first issue raised on this appeal is whether the trial court correctly overruled the defendant's motion to suppress his taped confession. The defendant contends that his taped confession is inadmissible under the Fifth,

Sixth, and Fourteenth Amendments to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution, because he did not knowingly and voluntarily waive his rights. The defendant argues that the confession was involuntary because: (1) he was not adequately apprised of his rights, (2) the circumstances surrounding his arrest, his low educational level, and his mental illness made it difficult for him to understand his rights, and (3) the police did not take the defendant before a magistrate "without unnecessary delay" as required by Tenn. R. Crim. P. 5(a). We find no merit to this argument.

The Fifth Amendment to the U.S. Constitution, which is applicable to the states through the Fourteenth Amendment, *see Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), gives an accused the right not to be "compelled in any criminal case to be a witness against himself." The Sixth Amendment to the U.S. Constitution, which is also applicable to the states through the Fourteenth Amendment, *see Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), gives an accused in all criminal prosecutions "the right . . . to have the assistance of counsel for his defense." Under the corresponding provisions of the Tennessee Constitution, "the accused hath the right to be heard by himself and his counsel . . . and shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9.

Although the right to counsel and the right against self-incrimination are constitutional rights, they may be waived provided the waiver is made "voluntarily, knowingly, and intelligently." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966). *See*

also State v. Smith, ___ S.W.2d ___ (Tenn. 1992). In determining whether a confession has been made knowingly and voluntarily, courts must look to the totality of the circumstances. *Oregon v. Elstad*, 470 U.S. 298, 318, 105 S. Ct. 1285, 1298, 84 L. Ed. 2d 222, 238 (1985); *State v. Kelly*, 603 S.W.2d 726, 728-29 (Tenn. 1980).

Before there can be a voluntary and knowing waiver, "the accused must be adequately and effectively apprised of his rights." *Miranda, supra*, 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719; *Smith, supra*, ___ S.W.2d at ___. At a minimum, the accused must be warned that he has the right to remain silent, that any statement made may be used as evidence against him, and that he has the right to have an attorney, whether retained or appointed, present during questioning. *Miranda, supra*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706; *Smith, supra* ___ S.W.2d at ___.

The first argument made by the defendant is that his taped confession was involuntary, because he was not adequately advised of his rights. The evidence presented at the hearing on the motion to suppress, however, demonstrates that the defendant was more than adequately advised of his rights.

The defendant was advised of his Miranda rights three times before he gave the taped confession. The first was at the time of his arrest, when he was being escorted to a patrol car from the wooded area where he was apprehended. Although he was complaining about the dog bites at that time, the defendant acknowledged that he understood his rights. The second time was shortly after he was placed in a patrol car to be transported to the

hospital. When he started to say something to the transporting officer, he was immediately advised of his rights and once again acknowledged that he understood them.

The third and final time the defendant was advised of his rights was shortly before the taped confession, after he had been treated and released from the hospital. After being advised for the third time, the defendant acknowledged that he understood his rights and waived them by signing the waiver of rights form read to him by Detective Pridemore. Moreover, after signing the waiver form, the defendant had one hour to think about his rights and decide whether to confess while the officers were taking the statement of Tammy Middlebrooks. During this hour, the defendant was permitted to eat a snack, drink a soda, and smoke a cigarette.

Although he had been advised of his rights three times, the defendant contends that the circumstances surrounding his arrest, particularly the dog bites, prevented him from understanding his rights. In addition, Middlebrooks contends that his low educational level and his mental illness prevented him from understanding his constitutional rights.

In *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984), *cert. denied*, 469 U.S. 873, 105 S. Ct. 226, 83 L. Ed. 2d 155 (1984), this Court addressed a similar argument in the context of a confession challenged on the basis that the defendant was in no condition to waive his rights as a result of pain from dog bites and a blow to the head. In rejecting this argument, the *Workman* court found that the defendant suffered "no material injury," and as a result, he was alert

and oriented when he was advised of his rights. *Id.*, 667 S.W.2d at 48.

As in *Workman*, we find that the defendant suffered no material injury affecting his ability to understand his *Miranda* rights. The evidence presented at the suppression hearing demonstrates that Middlebrooks was alert and oriented every time he was advised of his rights.

With respect to the argument that his education level and mental illness prohibited him from understanding his rights, we find no evidence in the transcript of the motion to suppress to support such a contention. Although there is evidence in the trial transcript regarding the defendant's mental capacity, no such evidence was presented during the suppression hearing. Moreover, we are not convinced from the evidence presented at trial, or the defendant's demeanor during the video-taped confession, that his mental disabilities prevented him from understanding his rights.

The final contention made by the defendant regarding the admissibility of his confession is that it was involuntary, because the police failed to take him before a magistrate "without unnecessary delay," as required by Tenn. R. Crim. P. 5(a). The defendant argues he should have been taken before a magistrate during the three-hour time period between his release from the hospital and the confession. If he had been taken before a magistrate during that time, the defendant contends that he might not have confessed.

In making this argument, the defendant urges this Court to construe Tenn. R. Crim. P. 5(a) in a manner similar to Fed. R. Crim. P. 5(a). Rule 5(a) of the Federal

Rules of Criminal Procedure is construed by 18 U.S.C.A. § 3501(c) (1985), which provides that a confession made while in the custody of law enforcement officers is not inadmissible solely because of delay in bringing that person before a magistrate, if the confession was given within six hours immediately following his arrest or other such detention. Applying this construction to Rule 5(a) of the Tennessee Rules of Criminal Procedure, the defendant contends that his confession is inadmissible because he was arrested at 7:00 a.m. and was not taken before a magistrate until after the taping of his confession concluded at 1:30 p.m., six and one-half hours after his arrest.

This argument, however, was addressed and rejected in *State v. Readus*, 764 S.W.2d 770 (Tenn. Crim. App. 1988), *appeal denied, id.* (Tenn. 1989). In *Readus*, after noting that Tennessee does not have a statute similar to 18 U.S.C.A. § 3501(c), the Court of Criminal Appeals held that:

> [t]he better reasoned cases interpreting "unreasonable delay" in this context say that it is one factor to be taken into account in evaluating the voluntariness of a confession; and that if the totality of the circumstances indicates that a confession was voluntarily given, it shall not be excluded from evidence solely because of delay in carrying the confessor before a magistrate.

Id., 764 S.W.2d at 774. *See also State v. Taylor*, 771 S.W.2d 387 (Tenn. 1989).

Applying this standard, we find that the defendant's confession was not involuntary as a result of the delay in taking him before a magistrate. There is no evidence that coercive influences were exerted upon him during the

time period between his release from the hospital and the taped confession, except for the inherently compelling atmosphere of being in police custody. As stated in *State v. Smith, supra*, ___ S.W.2d at ___, this single factor alone is not sufficient to vitiate the voluntariness of a confession. In addition, Middlebrooks was adequately apprised of his rights and there is no evidence that he failed to understand those rights.

Accordingly, under the totality of the circumstances, we hold that the defendant knowingly and voluntarily waived his constitutional rights and voluntarily confessed his involvement in the murder of Kerrick Majors. We therefore affirm the trial court's denial of the motion to suppress.

B. Jury Discretion To Impose The Death Penalty

The next issue presented on this appeal is whether the trial court's instructions removed the jury's discretion in deciding whether to impose the death penalty in violation of the defendant's rights under Article I, §§ 8, 16, and 19 of the Tennessee Constitution. The defendant contends that the trial judge made the death penalty mandatory by instructing potential and actual jurors, through both the juror information sheets and the jury instructions, that if aggravating circumstances outweigh mitigating circumstances, the sentence shall be death. We find no merit to this argument.

In its instructions, the trial court tracked the language of Tenn. Code Ann. § 39-2-203(g) (1982), the

governing sentencing statute at that time, which provided that:

> [i]f the jury unanimously determines that at least one statutory aggravating circumstance or several aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death.

Therefore, the defendant's challenge to the court's instructions is really an attack upon the sentencing statute.

The defendant first argues that "the sentence shall be death" portion of the statute violates Article I, § 19 of the Tennessee Constitution, which requires that "in all indictments for libel, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other criminal cases." The defendant contends that the "shall" language of § 39-2-203(g) deprives the jury of its constitutional powers under Article I, § 19, to impose its own decision. We disagree.

This argument was recently addressed in *State v. Black*, 815 S.W.2d 166 (Tenn. 1991), where we found that Tenn. Code Ann. § 39-3-203(g) does not violate Article I, § 19 of the Tennessee Constitution. Accordingly, we hold that the judge's instructions, which merely tracked the language of the statute, did not remove the jury's discretion in violation of Article I, § 19.

Along the same lines, the defendant argues that the judge's instructions violated Article I, § 8 of the Tennessee Constitution, which provides "[t]hat no man shall be

taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Other than just citing the provision, however, counsel for the defendant does not tell us how the instructions or the statute violates Article I, § 8. We can only surmise that counsel for the defendant believes that the "shall" language of the statute removes the jury's discretion and deprives the defendant of a "judgment of his peers."

We find the rationale of *State v. Black, supra*, under Article I, § 19, to be equally applicable to Article I, § 8. Accordingly, we hold that Tenn. Code Ann. § 39-2-203(g) does not remove the jury's discretion and deprive the defendant of a "judgment of his peers" in violation of Article I, § 8.

The defendant further contends that the jury instructions created a presumption of death, whereby the jury had to automatically impose the death penalty as soon as it found him guilty of kidnapping, a statutory aggravating circumstance under Tenn. Code Ann. § 39-2-2(3(i)(7) (1982). As a result, the defendant argues that the presumption created by the instructions improperly shifted the burden of proof from the State to the defendant.

Once again, this argument was recently addressed and rejected in *State v. Boyd*, 797 S.W.2d 589 (Tenn. 1990), where we found that the statute clearly outlines where the burden of proof lies and does not impose a presumption of death upon the finding of one aggravating circumstance. *Id.*, 797 S.W.2d at 596. As a result, we hold that the

judge's instructions did not create a presumption of death and shift the burden of proof to the defendant.

C. Jury Voir Dire and Challenges For Cause

The next issue we address is whether the trial court erred in failing to strike certain jurors for cause. The defendant contends that he had to exhaust his peremptory challenges on jurors that should have been excused for cause because their admitted beliefs in favor of the death penalty would have prevented them from following the law. Since he had to exhaust his peremptory challenges on those jurors, the defendant argues that he was deprived of the opportunity to empanel a fair and impartial jury in violation of the Sixth Amendment to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution.

Irrespective of whether the trial judge should have excluded the seven challenged jurors for cause, any error in this respect is harmless unless the jury who heard the case was not fair and impartial. *State v. Thompson*, 768 S.W.2d 239, 246 (Tenn. 1989). It is a long-settled principle that a defendant who disagrees with a trial court's ruling on for cause challenges must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise peremptory challenges to remove the jurors. Even then, however, the failure to correctly exclude a juror for cause is grounds for reversal only if the defendant exhausts all of his peremptory challenges and an incompetent juror is forced upon him. *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S. Ct. 2273, 2279, 101 L. Ed. 2d 80, 91 (1988); and *State v. Jones*, 789 S.W.2d 545, 549 (Tenn. 1990).

In this case, there is no claim, and the record does not show, that an incompetent juror was forced upon the defendant. Although counsel for the defendant argues that he had to exhaust all of his peremptory challenges on jurors that should have been excluded for cause, he does not tell us how Middlebrooks was prejudiced by not being able to peremptorily challenge any of the jurors who ultimately heard the case. The voir dire transcripts demonstrate that each juror hearing the case was competent, and there is no evidence that the defendant was deprived of a fair and impartial jury. Accordingly, we find no merit to the defendant's argument.

D. Admissibility of Evidence

The defendant further argues that the trial court erred in permitting certain evidence to be introduced at trial, thereby effectively denying Middlebrooks his right to a fair trial in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, and Article I, §§ 8 and 16 of the Tennessee Constitution. Specifically, the defendant challenges the admission of Shannon Stewart's testimony, the admission of Detective Moore's testimony, and the admission of photographs during the guilt and penalty phases of the trial.

The defendant contends that the trial court erred in allowing Shannon Stewart to testify that Middlebrooks told him on the morning of the murder that he was a member of the Ku Klux Klan, that he disliked "niggers," and that he once busted a black man in the mouth for saying "hi" to him. The defendant argues that this testimony is inadmissible hearsay, that it is irrelevant, and

that its probative value is substantially outweighed by its prejudicial effect. We find no merit to this argument.

We conclude that the elicited testimony regarding the defendant's statement that he dislikes blacks fits within the state of mind exception of Tenn. R. Evid. 803(3), which provides in part, that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is admissible hearsay. Although the Tennessee Rules of Evidence were not in effect at the time of trial, the rule merely restates the common law state of mind exception which has long been recognized by Tennessee courts. Tenn. R. Evid. 803(3), Advisory Commission Comments. Accordingly, the trial court correctly admitted Stewart's testimony about the defendant's statement evidencing his dislike for blacks under the state of mind exception to the hearsay rule.

In addition, we find that all three of the defendant's statements were admissions, and are therefore admissible. Under the Tennessee common law rules of evidence, the statements would be admissible as an exception to the hearsay rule. *State v. Jones*, 598 S.W.2d 209, 223 (Tenn. 1980). On the other hand, under the Federal Rules of Evidence, the statements would be admissible non-hearsay. Fed. R. Evid. 801(d)(2). Regardless, however, "whether a criminal defendant's own statement[s] be treated as an exception to the hearsay evidence rule, or as an admission not governed by the rule, the result is the same. The admission is competent proof." *State v. Jones, supra*, 598 S.W.2d at 223.

With respect to the other objections, the trial court ruled that the defendant's statements were relevant to the issue of premeditation, and that the probative value of the statements outweighed their prejudicial effect. We agree.

The testimony is clearly relevant to show premeditation and a motive for the victim's brutal slaying. The testimony is also relevant to contradict the defendant's statement that Roger Brewington was the leader in the commission of the offense. In addition, given the relevancy of the statements, we find that the prejudicial effect did not substantially outweigh their probative value. *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978). Accordingly, we hold that the trial court correctly admitted Shannon Stewart's testimony about these statements.

The defendant next contends that the trial court erred in admitting the testimony of Detective Moore with respect to the issue of whether the bloody T-shirt around the victim's neck had been used as a gag. Although he had not been offered as an expert, Detective Moore testified that the bloody T-shirt had been used as a gag. After defense counsel objected and a bench conference was held, the trial judge allowed Detective Moore to testify as to whether the bloodstains on the T-shirt "appeared to correspond consistent with its use as a gag." The defendant contends that this testimony is inadmissible lay opinion, which improperly encroaches upon the jury's fact-finding function.

A non-expert witness must ordinarily confine his testimony to a narration of facts based on first-hand knowledge and avoid stating mere personal opinions.

Blackburn v. Murphy, 737 S.W.2d 529, 531 (Tenn. 1987). The purpose of this rule is "to preserve the primary fact-finding role of the jury, since '[i]t is the function of the witness to state evidentiary facts and the function of the jury to draw such conclusions as the facts warrant.' " *Id.* (quoting *Wilson v. Nashville, Chattanooga & St. Louis Ry.*, 16 Tenn. App. 695, 705, 65 S.W.2d 637, 643 (1933)).

Nevertheless, there are exceptions to the general rule. "Non-expert opinion testimony can be admissible when 'such testimony describes observed facts in the only way in which they can be clearly described.' " *Id.*, 737 S.W.2d at 532 (quoting *National Life & Accident Ins. Co. v. Follett*, 168 Tenn. 647, 662, 80 S.W.2d 92, 98 (1935)). Therefore, admissible lay opinion testimony is limited to those circumstances

> [w]here facts perceived by the senses are numerous, and it is difficult to describe them adequately to the jury, and the conclusion or inference to be drawn from such facts is simple and within the range of common experience, and the witness can relate what he has seen more accurately and more easily by stating his conclusion than by attempting to detail the [evidentiary] facts.

Id. (quoting *Reed v. Allen*, 522 S.W.2d 339, 343 (Tenn. App. 1974)).

In this case, there is a close question as to whether Detective Moore's testimony crossed the line between permissible and impermissible lay opinion. However, even assuming it was inadmissible lay opinion, we find that any error in admitting his testimony was harmless. "An error is harmless or prejudicial depending on the

extent to which the proof in the record exceeds the standard necessary to sustain a jury decision. . . . Thus, the more convincing the evidence, the less prejudicial the error." *State v. Bobo*, 727 S.W.2d 945, 955-56 (Tenn. 1987). Since the defendant admitted in his taped confession that the victim was gagged, any error in admitting Detective Moore's testimony about the bloody T-shirt being used as a gag was harmless.

The defendant further argues that the trial court erred in admitting prejudicial photographs during the trial. The defendant contends that it was error for the trial court to admit, during the guilt phase, a photograph of the knife he had in his possession when he was arrested. In addition, the defendant argues that it was error for the trial court to admit photographs of the victim during the penalty phase of the trial.

Before admitting photographs, a trial judge must determine whether they are relevant, and whether their probative value is substantially outweighed by their prejudicial effect. *State v. Banks*, 564 S.W.2d 947, 949-51 (Tenn. 1978). These determinations lie within the discretion of the trial court, and the trial court's rulings will not be disturbed on appeal unless there is a clear showing of an abuse of discretion. *Id.*, 564 S.W.2d at 949.

After examining the photographs, we find that the trial judge did not abuse her discretion by admitting them into evidence. The photograph of the knife was relevant to rebut the defendant's claim that he was unjustly attacked by the police dogs. Moreover, we fail to see how the defendant was prejudiced by admission of the photograph since it depicted a common butcher knife,

rather than a specially designed knife such as the murder weapon, lying in the floor of the defendant's make-shift home.

The photographs of the victim's body were properly admitted during the penalty phase because they were relevant to prove one of the aggravating circumstances, i.e. that "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Tenn. Code Ann. § 39-2-203(i)(5) (1982). Moreover, although Detective Moore testified as to the wounds and condition of the body, the photographs supplement his testimony and show the brutality employed by the killer in inflicting numerous wounds on the victim. *State v. Miller*, 771 S.W.2d 401, 404 (Tenn. 1989); *State v. Harbison*, 704 S.W.2d 314, 318 (Tenn. 1986). Accordingly, despite the fact that the photographs are graphic, we hold that their probative value is not substantially outweighed by their prejudicial effect.

E. Felony Murder – Nexus Between Felony and Murder

The next issue for our determination is whether the trial court correctly overruled the defendant's motion for a judgment of acquittal. The defendant contends that the court should have granted the motion with respect to the felony murder count of the indictment on the basis that there was an "insufficient nexus" between the kidnapping and the murder, such that the kidnapping could not have been the proximate cause of the murder. This argument is clearly without merit.

The statute provides that "[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any . . . kidnapping . . . is murder in the first degree." Tenn. Code Ann. § 39-2-202(a) (1982 & Supp. 1988). Nowhere in the statute is there a requirement that the murder occur as a proximate cause of the kidnapping. The statute only requires that the murder be "committed in the perpetration of" a kidnapping, which is defined as the unlawful seizure, confinement, or abduction of another with the felonious intent to cause the other to be confined or detained secretly against his will. Tenn. Code Ann. § 39-2-301(a) (1982 & Supp. 1988).

The record clearly demonstrates that Kerrick Majors was seized in a headlock and taken to a wooded area against his will. The record also shows that during the period he was being held against his will, Kerrick was beaten and stabbed to death. As a result, it is clear that the murder of Kerrick Majors was "committed in the perpetration of" a kidnapping.

F. Psychiatric Records of Witness For Cross-Examination

The defendant argues that the trial court erred in refusing to allow defense counsel access to the confidential psychiatric records of Shannon Stewart for cross-examination. Toward the end of the State's examination of Stewart, defense counsel informed the court that he had just learned that morning that Stewart was presently undergoing psychiatric care at Cumberland Hall Psychiatric Hospital in Nashville. As a result, defense counsel

moved to review Stewart's records from this hospitalization before beginning cross-examination to ascertain if his mental condition interfered with his memory of past events.

After reviewing Stewart's prior statements and his testimony at Roger Brewington's trial, the trial court found that they were consistent with and contained no substantial variation from his testimony at this trial to warrant turning the records over to the defense, and denied defense counsel's motion. For the purposes of appellate review, however, the trial court ordered a transcript of Stewart's testimony at the Brewington trial and a sealed copy of his psychiatric records to be made exhibits to the trial record.

The defendant contends that the trial court's failure to allow counsel to examine Stewart's records deprived him of the opportunity to confront witnesses against him, in violation of his rights under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution. In addition, the defendant contends that he was entitled to review the records under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and Tenn. R. Crim. P. 16(a)(1)(D).

The Sixth Amendment to the U.S. Constitution, which is applicable to the States through the Fourteenth Amendment, *see Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The corresponding provision of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the

accused hath the right . . . to meet the witnesses face to face." Tenn. Const. art. I, § 9. Although the language is not identical, this Court has previously adopted the standards of the U.S. Supreme Court under the Sixth Amendment in determining whether there has been a violation of the confrontation clause of Article I, § 9. *State v. Armes*, 607 S.W.2d 234, 237 (Tenn. 1980).

The confrontation clause or the Sixth Amendment provides two types of protection for criminal defendants: the right to physically face those who testify against him, and the right to cross-examine witnesses. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S. Ct. 989, 998, 94 L. Ed. 2d 40, 53 (1987). The right to cross-examine witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. *Id.*, 480 U.S. at 53, 107 S. Ct. at 999, 94 L. Ed. 2d at 54. Therefore, the right to confront witnesses is satisfied if defense counsel receives wide latitude at trial to cross-examine, because the confrontation clause only guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294, 88 L. Ed. 2d 15, 19 (1985)).

In this case, we find that the defendant was not denied the opportunity to effectively cross-examine Shannon Stewart. The trial court denied defense counsel's motion without conducting an *in camera* inspection of the records to determine what, if any, probative information they contained. This was error because the psychiatric records pertained to the mental instability of a witness

that existed within a reasonable time before the testimony was given, which is relevant in determining veracity. *State v. Barnes*, 703 S.W.2d 611, 617-18 (Tenn. 1985). However, the error was harmless because if the trial court had reviewed the records, as we have done, it would have found that they contained very little information probative of Stewart's credibility.

The records indicate that Stewart was hospitalized at the time of trial for what were essentially behavioral problems. As a result, the information contained in the records had little relevance to Stewart's credibility or the probative value of his testimony. In addition, there is nothing in the trial record to demonstrate that defense counsel was prevented from asking Stewart about his hospitalization. We therefore conclude that the defendant was not denied the opportunity "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347, 355 (1974).

The defendant next argues that his counsel was entitled to review the psychiatric records under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In *Brady*, the Supreme Court held that it is a violation of the due process clause of the Fourteenth Amendment for the prosecution to suppress evidence favorable to an accused after a request for disclosure "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218. Since there has been no showing that

records contained any material evidence favorable to the defendant, we find no merit to this argument.

The final argument raised by the defendant regarding the psychiatric records is that he was entitled to review them under Tenn. R. Crim. P. 16(a)(1)(D), which provides that:

> [u]pon request of a defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney general and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

We find no merit to this argument because there is no evidence that Cumberland Hall is connected in any way with the State so that the records could be considered 'within the possession, custody or control of the state" for discovery purposes under Rule 16(a)(1)(D). *State v. Fox* 733 S.W.2d 116, 118 (Tenn. Crim. App. 1987). In addition, there has been no showing that the information contained in the records was "material to the preparation of the defense."

Accordingly, we affirm the trial court's decision to deny counsel for the defendant access to Shannon Stewart's confidential psychiatric records.

G. Jury Argument – Death Penalty Deterrence

The next issue raised by the defendant is whether the trial court erred in overruling the defendant's motion, prior to the sentencing phase, to prohibit the State from arguing to the jury the deterrent effect of the death penalty. In overruling the motion, the trial judge indicated that she would allow argument on specific deterrence, i.e., deterrence of the defendant, as opposed to general deterrence, since the defendant had put on proof that, if properly medicated, he would function well under a life sentence. The defendant contends that since defense counsel cannot argue that the death penalty has no deterrent effect under this Court's holding in *State v. Johnson*, 632 S.W.2d 542, 547-48 (Tenn. 1982), then the State should not be allowed to argue that the death penalty does have a deterrent effect.

This argument is completely without merit. We are unable to find, and counsel for the defendant has not pointed out, anywhere in the State's argument to the jury a reference to either the specific or general deterrent effect of the death penalty.

H. Missing Witness Rule

The defendant next argues on appeal that the trial court erred in refusing to give the jury instructions on the missing witness rule due to the absence of testimony from Middlebrook's co-defendants; and whether the trial court erred in preventing defense counsel from commenting upon the absence of the co-defendants. Under the missing witness rule, a party is entitled to argue, and

have the jury instructed, that if the other party has it peculiarly within his power to produce a witness whose testimony would naturally be favorable to him, the failure to call that witness creates an adverse inference that the testimony would not favor his contentions. *State v. Francis*, 669 S.W.2d 85, 88 (Tenn. 1984); *State v. Jones*, 598 S.W.2d 209, 224 (Tenn. 1980). Before the missing witness rule can be invoked, however, the evidence must show that "the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and that the missing witness was available to the process of the Court for trial." *Delk v. State*, 590 S.W.2d 435, 440 (Tenn. 1979).

The defendant contends that during the guilt phase of the trial, defense counsel should have been able to comment upon, and have the jury instructed upon, the absence of testimony from Roger Brewington and Tammy Middlebrooks under the missing witness rule. The defendant argues that the trial court's refusal to instruct the jury and allow comment upon the missing witnesses left him with the only option of calling the co-defendants to testify, thereby impermissibly shifting the burden of proof in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution, and Article I, §§ 8 and 17 of the Tennessee Constitution.

We find no merit to this argument because defense counsel expressly disavowed any intent to rely on the missing witness rule during the guilt phase. After closing argument, while arguing his motion for a mistrial, defense counsel stated that "I did not seek the missing

witness charge because I did not think it was appropriate." Since defense counsel did not raise this issue during the trial or in the motion for new trial, the issue is waived and cannot be raised for the first time on appeal to this Court. Tenn. R. App. P. 3(e).

Next, the defendant contends that the trial court erred in granting the State's motion to prevent defense counsel from arguing the missing witness rule to the jury during the sentencing phase. The defendant argues that the trial court's ruling was incorrect, and prevented him from taking advantage of the adverse inference to prove one of the statutory mitigating circumstances, i.e., that "[t]he defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor." Tenn. Code Ann. § 39-2-203(j)(5) (1982). As a result, the defendant contends that the trial court's incorrect ruling denied him of his constitutional right to a fair trial and resulted in the arbitrary and capricious imposition of the death penalty.

We find no merit to this argument because the trial court correctly ruled that the defendant could not argue the missing witness rule to the jury during the sentencing phase. After reviewing the requirements for invoking the missing witness rule, the trial court ruled that the defendant had not met the requirements of expected favorable testimony and exclusive availability. We agree.

There is nothing in the record to indicate that a relationship existed between the State and either Roger Brewington or Tammy Middlebrooks such that would naturally incline them to testify favorably for the State. The co-defendants had already been convicted, and there

was no pending plea bargain agreement between them and the State at the time of the defendant's trial. In addition, there is no evidence that it was peculiarly within the power of the State to produce the co-defendants to testify. Accordingly, we affirm the trial court's ruling on this issue.

I. Requests For Jury Instructions

The next issue for us to consider is whether the trial court erred in refusing to instruct the jury pursuant to the defendant's request for special instructions. The defendant contends that the trial court's refusal to instruct the jury in accordance with twelve special requests deprived him of his constitutional right to a fair trial.

After reviewing the proposed instructions and the actual jury charge, we find no error in the trial court's refusal to give the proposed instructions. Some of the proposed instructions incorrectly state the law, while the other proposed instructions were adequately covered in the judge's actual charge to the jury. Accordingly, since "[i]t is not error to refuse a special request where the charge as given fully and fairly states the applicable law," *Edwards v. State*, 540 S.W.2d 641, 649 (Tenn. 1976), we affirm the trial court on this issue.

PART II.
CONSTITUTIONALITY OF THE DEATH PENALTY FOR FELONY MURDER

The final issue raised on this appeal is whether the trial court erred in overruling the defendant's motion to

dismiss the indictment on the basis that the death penalty is unconstitutional. The defendant challenges the death penalty itself as cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution. We find no merit to this argument. It has been considered and rejected many times by this Court. *State v. Black*, 815 S.W.2d 166, 185 (Tenn. 1991); and *State v. McCormick*, 778 S.W.2d 48, 53 (Tenn. 1989).

Although the defendant has not directly raised the issue, we wish to address the issue of the constitutionality of Tennessee's death penalty statute as punishment for felony murder. A majority of the present Court has held that the death penalty *per se* does not violate Article I, § 16 of the Tennessee Constitution, *see State v. Black, supra*, 815 S.W.2d at 189-91, but we have not yet considered the issue of the constitutionality of the death penalty as punishment for felony murder.

> The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule imposed a mandatory death sentence on all convicted murderers. *McGautha v. California*, 402 U.S. 183, 197-198, 91 S.Ct. 1454, 1462-1463, 28 L.Ed.2d 711 (1971). And the penalty continued to be used into the 20th century by most American States, although the breadth of the common-law rule was diminished, initially by narrowing the class of murderers to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy. *Id.*, at 199-200, 91 S.Ct., at 1463-1464. *See Woodson v. North Carolina*, 428 U.S. 280, 289-292, 96 S.Ct. 2978, 2984-2985, 49 L.Ed.2d 944.

Gregg v. Georgia, 428 U.S. 153, 176-77, 96 S. Ct. 2909, 2927, 49 L. Ed. 2d 859, 876-77 (1976).

In Tennessee, under the pre-1989 law, first-degree murder was defined as follows:

> [e]very murder perpetrated by means of poison, lying in wait, or by other kinds of willful, deliberate, malicious, and premeditated killing, or *committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb. . . .*

Tenn. Code Ann. § 39-2-202(a) (1982 & Supp. 1988) (emphasis added).

With the exception of the inclusion of different underlying felonies over the years, the so-called felony murder statute remains essentially the same as that enacted in § 3 of Chapter 23 of the Public Acts of 1829.[2] The 1829 Act was modeled on the Pennsylvania Act of 1794, 1794 Pa. Laws, ch. 1766, § 2, which divided the common-law offense of murder into two degrees in order

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[2] *Norris* held that the felony murder statute's failure to require intent to kill or express malice was not unconstitutional in a noncapital case. Agreeing, this Court has held that the felony murder statute does not violate the due process clause of the Fifth Amendment to the United States Constitution by elevating accidental killings, or those in self-defense, or a lesser degree of homicide to first-degree murder, if committed during one of the listed felonies. *State v. Barber*, 753 S.W.2d 659, 671 (Tenn. 1988).

to achieve proportionality in punishment and to restrict the imposition of the death penalty. *See* Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 759 (1949); *see also Bratton v. State*, 29 Tenn. 103, 110 (1849) (recognizing the Pennsylvania statute is almost identical to Tennessee's).

Under Tennessee's statutory definition of felony murder, prior to the 1989 Code Revision, the prosecution is not required to prove the elements of malice, deliberation and premeditation, or that the defendant intended to kill the victim. *State v. Johnson*, 661 S.W.2d 854, 861 (Tenn. 1983); *Farmer v. State*, 201 Tenn. 107, 115, 296 S.W.2d 879, 883 (1956); *State v. Hopper*, 695 S.W.2d 530, 535 (Tenn. Crim. App. 1985); *Tosh v. State*, 527 S.W.2d 146, 147-48 (Tenn. Crim. App. 1975). Instead, where the offense is committed in the perpetration of a designated felony, the elements of malice, deliberation and premeditation are implied. *See State v. Barber*, 753 S.W.2d 659, 671 (Tenn. 1988); *State v. Norris*, 684 S.W.2d 650, 653 (Tenn. Crim. App. 1984).[3]

The Tennessee offense extends both to the killer and his accomplices. A defendant who is a willing and active participant in a robbery becomes accountable for all of

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[3] Norris held that the felony murder statute's failure to require intent to kill or express malice was not unconstitutional in a noncapital case. Agreeing, this Court has held that the felony murder statute does not violate the due process clause of the Fifth Amendment to the United States Constitution by elevating accidental killings, or those in self-defense, or a lesser degree of homicide to first-degree murder, if committed during one of the listed felonies. *State v. Barber*, 753 S.W.2d 659, 671 (Tenn. 1988).

the consequences flowing from the robbery and may be convicted of first-degree murder where a co-perpetrator of the felony is the actual killer. *Dupes v. State*, 209 Tenn. 506, 512, 354 S.W.2d 453, 456 (1962); *Woodruff v. State*, 164 Tenn. 530, 537, 51 S.W.2d 843, 845 (1932); *Moody v. State*, 46 Tenn. 299, 305-307 (1869); *State v. Brown*, 756 S.W.2d 700, 703 (Tenn. Crim. App. 1988); *State v. Hopper, supra*, 695 S.W.2d at 535.

The result of the felony murder doctrine in Tennessee is thus to impose a rule of strict liability allowing the underlying felonious intent to supply the required mens rea for the homicidal actus reus and to impose vicarious liability for the acts of another. *See, generally*, Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356, 366-369 (1978). Therefore, Tennessee's statute allows convictions for first-degree felony murder of those who commit accidental killings, and of persons who did not kill the victim and may not have intended that the victim be killed or suffer any physical harm.

Courts have often stated that the purpose of the felony murder rule is to deter felons from accidentally or negligently killing in the course of felonies by holding them strictly liable for the results of their dangerous conduct. *See, e.g., People v. Washington*, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965); *State v. Lashley*, 233 Kan. 620, 631, 664 P.2d 1358, 1369 (1983); *Payne v. State*, 81 Nev. 503, 506, 406 P.2d 922, 924 (1965). Consistent with that purpose, many courts have limited

the scope of the rule to felonies that are dangerous to human life.[4]

The felony murder doctrine has been frequently and negatively criticized by courts and legal commentators, the criticism by commentators becoming even more intense when felony murder is used to make a defendant death eligible. *See. e.g., People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980); Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 Ariz. L. Rev. 819 (1990); Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103 (1990); Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446 (1985); Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356 (1978).

As more refined standards of culpability have developed, some courts and commentators have said that the intent to commit a felony is not equivalent to the other mental states associated with murder. *See* W. LaFave and A. Scott, *Handbook on Criminal Law*, § 71, at 554 (1972). As a result of this and other criticisms, some jurisdictions have abolished the felony murder rule by statute or by judicial action.[5]

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[4] The rationale for limiting the rule to dangerous felonies is that in order for the potential felon to be deterred, he must foresee the possibility of death or injury resulting from the commission of the felony.

[5] The rule was abolished in England in 1957. *See* Homicide Act 1957, 5 & 6 Elizabeth II, ch. 11, § 1. Alaska, Hawaii, and Kentucky have abolished the felony murder rule by statute, requiring that the killing be intentional or knowing. In Michigan, the judiciary abrogated the rule in *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980). Legislatures in other jurisdictions have responded to the criticisms by requiring proof of a higher degree of culpability. For example, Arkansas and New Hampshire require proof of recklessness in addition to commission of a felony. *See* Ark. Stat. Ann. § 41-1502 (1977) and N.H. Rev. Stat. Ann. § 630:1, 1(a), and 1(b) (1974).

Nonetheless, the vast majority of states that have the death penalty permit it to be imposed in cases of felony murder under some circumstances. Few legislatures have repealed the doctrine, and the courts have generally continued to enforce it. There are thirty-six states which allow the imposition of the death penalty, and thirty-two of these states allow the death penalty for felony murder. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 Ariz. L. Rev. at 890. Most states impose the death penalty only where killings perpetrated during felonies are intentional, deliberate, purposeful or knowing. The number of states allowing capital punishment for pure felony murder, or felony murder simpliciter, is a distinct minority. Tennessee moved out of that status in 1989 by amending its first-degree murder statute to provide that first-degree murder occurs only where a killing in the perpetration of one of the listed felonies is reckless. *See* Tenn. Code Ann. § 39-13-202(a)(2) (1991).[6]

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[6] "Reckless" is defined as the actions of one who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person

The minimum standards for determining whether a sentence of death may be constitutionally imposed under the United States Constitution for felony murder are indicated by the United States Supreme Court in *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), which dealt with the problem of imposing the death penalty in cases of vicarious liability for felony murder, i.e., where an accomplice in the felony, one who did not actually kill the victim, is convicted of murder under the felony murder doctrine and receives the death penalty.

Under the rules of those cases, the death penalty is only permissible under the Eighth and Fourteenth Amendments for one who himself kills, attempts to kill, or intends that a killing take place or that lethal force will be imposed, *Enmund*, 458 U.S. at 797, 102 S. Ct. at 3376, 73 L. Ed. 2d at 1151, or for one whose personal involvement in the underlying felony is substantial and who exhibits a reckless disregard or indifference to the value of human life – although there is no intent to kill, *Tison*, 48 U.S. at 157-58, 107 S. Ct. at 1687-88, 95 L. Ed. 2d at 144.

These federal standards do not, however, answer the question under the state constitution. As Justice Brock observed in his dissent in *State v. Dicks*, 615 S.W 2d 126, 132 (Tenn. 1981), we may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantee, but

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would exercise under all the circumstances as reviewed from the accused person's standpoint.
Tenn. Code Ann. § 39-11-106(a)(31).

may impose higher standards and stronger protections than those set by the federal constitution.

The present Court first examined the constitutionality of the imposition of capital punishment under Article I, § 16 of the state constitution in *State v. Black*, 815 S.W.2d 166 (Tenn. 1991). There, we elected to follow the analysis of *Gregg v. Georgia, supra*, under which three inquiries are required:

> First, does the punishment for the crime conform with the contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate, penological objective?
>
> *State v. Ramseur*, 106 N.J. 123, 169, 524 A.2d 188, 210 (1987) (citing *Gregg v. Georgia*, 428 U.S. at 173, 96 S.Ct. at 2925, 49 L. Ed. 2d at 874-75).

In *Black*, a majority of the present Court reaffirmed the prior holdings of this Court that the death penalty does not *per se* violate Article I, § 16, of the Tennessee Constitution. 815 S.W.2d at 190-91. As a part of our analysis, we said that the legislative and constitutional history of Tennessee indicates a clear intent that the death penalty is, in some cases, an appropriate form of punishment, and that by reason of the language of the Constitution, the framers recognized the acceptability of capital punishment. *Id.*, 815 S.W.2d at 188. In addition, we noted that nothing in the constitutional legislative history mandates that death is invalid *per se* as cruel and unusual punishment under Article I, § 16. *Id.*

In determining whether the death penalty conforms with contemporary standards of decency for the crime of felony murder, we recognize that an assessment of contemporary values is relevant and that the standards of decency are not static, but are evolving as society matures. See *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, 642 (1958). As *Gregg v. Georgia* teaches, this assessment of contemporary values is not subjective, but an examination of objective indicia that reflect the public attitude towards a given sanction. 428 U.S. at 173, 96 S. Ct. at 2925, 49 L. Ed. 2d at 874.

It is evident that a large proportion of Tennessee society continues to find the death penalty for felony murder an appropriate and necessary criminal sanction. This approval is clearly evidenced by the actions of the General Assembly in re-enacting the 1977 felony murder statute after the 1972 decision of the United States Supreme Court in *Furman v. Georgia*, 409 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and our own state court decisions declaring the prior statute allowing the death penalty unconstitutional. *See Collins v. State*, 550 S.W.2d 643 (Tenn. 1977), *cert. denied sub nom. Morgan v. Tennessee*, 434 U.S. 905, 98 S. Ct. 303, 54 L. Ed. 2d 192 (1977); *State v. Hailey*, 505 S.W.2d 712 (Tenn. 1974). The General Assembly's response to these court actions was to enact new statutes addressing the concerns expressed by the *Furman* court, but which continued to provide for the death penalty for felony murder. Legislatures of at least thirty-four other states took similar actions. *See Gregg v. Georgia*, 428 U.S. at 179-80, 96 S. Ct. at 2928, 49 L. Ed. 2d at 878. As recently as 1989, the General Assembly reaffirmed that

position. *See* Revised Criminal Code of 1989, 1989 Tenn. Pub. Acts, ch. 591, § 1.

Examination of other state systems reveals that capital punishment for felony murder in some circumstances is acceptable in at least thirty-two of the thirty-six states with the death penalty. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 Ariz. L. Rev. at 890. In four states – Florida, Georgia, South Carolina, and Wyoming – there is presently no requirement of culpability. *See* Fla. Stat. Ann. § 782.04, and § 921.141(5)(d) (West Supp. 1992); Ga. Code Ann. § 26-1101 and § 27-2534.1 (Michie 1988); S.C. Code Ann. § 16-3-20(c)(a)(l) (Law. Co-op. Supp. 1991); and Wyo. Stat. § 6-2-101(a) and § 6-2-102(h)(iv) (Supp. 1991). Tennessee, as noted above, was previously a member of this minority position.

In addition to the legislative response, as *Gregg v. Georgia* points out, the jury is a significant and reliable objective index of contemporary values because it is so directly involved and because it maintains a link between contemporary community values and the penal system. 428 U.S. at 181, 96 S. Ct. at 2929, 49 L. Ed. 2d at 879. Since the reimposition of the death penalty for felony murder in 1977, juries have consistently imposed the death penalty for that offense. *See, e.g., State v. Boyd*, 797 S.W.2d 589 (Tenn. 1990); *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988); *State v. Bell*, 745 S.W.2d 858 (Tenn. 1988); *State v. Sparks*, 727 S.W.2d 480 (Tenn. 1987); *State v. Goad*, 707 S.W.2d 846 (Tenn. 1986); *State v. Hartman*, 703 S.W.2d 106 (Tenn. 1985); *State v. Matson*, 666 S.W.2d 41 (Tenn. 1984); *State v. Simon*, 635 S.W.2d 498 (Tenn. 1982); *State v. Coleman*, 619 S.W.2d 112 (Tenn. 1981).

The second question that must be answered under the *Black* test, adopted from *Gregg*, is whether the punishment of death is disproportionate in relation to the crime for which it is imposed. We are concerned here only with the imposition of capital punishment for the crime of felony murder in the abstract.

As stated earlier, under the statute prior to the 1989 revision, a person was guilty of first-degree murder under the felony murder doctrine without regard to intent to kill so long as the killing occurred during the perpetration of a felony. Yet, this absence of intent does not render the death penalty disproportionate. As Justice O'Connor observed, writing for the majority in *Tison v. Arizona*, 481 U.S. at 157, 107 S.Ct. at 1688, 95 L. Ed. 2d at 144:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another, not caring whether the victim lives or dies, *or the robber who shoots someone in the course of the robbery utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property*. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an intent to kill.

(Emphasis added.) See *also Schad v. Arizona*, 501 U.S. ___, 111 S. Ct. 2491, 115 L.Ed.2d 555 (1991).

In the early case of *State v. Pritchett*, 621 S.W.2d 127 (Tenn. 1981), the defendant argued that felony murder resulted

> in imposition of the death penalty in the absence of premeditation and in cases involving the least, rather than the most 'blameworthy' of murderers, because, it is insisted, the statute contains no guidelines for ascertaining culpability or the degree of culpability that will prevent disproportionate application of the death penalty.

Id., 621 S.W.2d at 140. This Court replied,

> [t]he short answer to the issue posed by defendant is that, conceding such a result may be possible in the trial court, it is the statutory and inherent obligation of this Court to correct the error on appeal. An integral part of the death penalty statute that must be construed in pari materia is the automatic review of every death sentence by this Court. T.C.A. § 39-2406. Subsection (c) of that statute enumerates our duties that include eliminating any arbitrary, excessive, or disproportionate imposition of the death penalty. . . .

Id.

Accordingly, rather than an absolute rule of *per se* disproportionality this Court has in the past relied on its statutory duty of review under Tenn. Code Ann. § 39-2-205 [now § 39-13-206] to assure that the sentence *in each case* is not disproportionate or excessive. We agree with that approach and with Justice Blackmun's rejection of the *per se* proportionality approach in his dissent in *Lockett v. Ohio*, 438 U.S. 586, 613-19, 98 S. Ct. 2954, 2969-71, 57 L. Ed. 2d 973, 995-98. He observed in that connection that a sentence in felony murder should be

based on evidence of a particular defendant's participation in homicide and his mens rea in regard to the homicidal act.

We, therefore, reaffirm the rejection of a *per se* proportionality approach in favor of the required statutory proportionality review.

The third question for the Court under the *Black* test is whether the infliction of the death penalty for felony murder goes beyond that necessary to accomplish any legitimate penological objective. On the one hand it has been argued that, because felony murder encompasses unintentional and accidental murders, the legitimate penological objective of deterrence is not satisfied. In response, we observe that the legislature may decide that the death penalty is even more effective in deterring felony murders than simple atrocious murders since an experienced felon is more likely to assess the consequences of his acts than other murderers who are more likely to act on passion or impulse, unmindful of the consequences of their actions. *Gray v. Lucas*, 677 F.2d 1086, 1104 (5th Cir. 1982) (replying to an equal protection/due process challenge to capital felony murder). *See* Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 Harv. J.L. & Pub. Pol'y 359 (1985).

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia, supra*, 428 U.S. at 183, 96 S.Ct. at 2929-30, 49 L. Ed. 2d at 880. As we commented in *Black*:

> [w]hile increasingly questioned, retribution remains a valid penological justification for the death penalty.
>
> > [C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
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> *Gregg v. Georgia*, 428 U.S. at 183, 96 S.Ct. at 2930. Channeling man's natural instinct for retribution "serves an important purpose in promoting the stability of a society governed by law" for "the seeds of anarchy are sown" when "people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve.' " *Furman v. Georgia*, 408 U.S. at 308, 92 S.Ct. at 2761 (Stewart, J., concurring).
>
> *State v. Black*, 815 S.W.2d at 190.
>
> > Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.
>
> *Gregg v. Georgia*, 428 U.S. at 184, 96 S.Ct. at 2930, 49 L. Ed. 2d at 880-81.

We conclude that the death penalty for felony murder in Tennessee does not *per se* violate Article I, § 16 of the Tennessee Constitution. As we observed in *Black*, the issue of whether or not the death penalty constitutes

cruel and unusual punishment is, in the last analysis, a moral question which has been resolved in this State by our legislature as the representative of the people. It is not the role of this Court to "superimpose personal morality" in difficult issues, *State v. Campbell*, 103 Wash. 2d 1, 34, 691 P.2d 929, 948 (1984), nor to act as "a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 525, 71 S. Ct. 857, 875, 95 L. Ed. 1137, 1161 (1951) (Frankfurter, J., concurring). For these reasons, we reaffirm the prior holdings of this Court that the death penalty in felony murder does not *per se* violate Article I, § 16 of the Tennessee Constitution.

PART III.

SENTENCING PHASE – CONSTITUTIONAL APPLICATION OF AGGRAVATING CIRCUMSTANCES

A corollary to the general argument that imposing the death penalty for felony murder is not constitutional is that Tennessee's death penalty statute does not sufficiently narrow the population of death-eligible defendants under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution. The argument is that it fails to narrow by allowing the use of Tenn Code Ann. § 39-2-203(i)(7) as an aggravating circumstance in sentencing.

As applied in this case, prior to the revision of the Criminal Code of 1989, the aggravating circumstance of committing a murder during a felony essentially duplicated the elements of the offense of first-degree felony murder. Tenn. Code Ann. § 39-2-202(a)(1) (Supp. 1988)

provided, in part, that "[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree." The aggravating circumstance set forth in Tenn. Code Ann. § 39-2-203(i)(7) (1982), allowed a sentence of death upon a conviction of first-degree murder where

> [t]he murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

This duplication of the elements of the offense by one of the aggravating factors has been challenged by capital defendants in the past. Some of the earlier attacks were based on double jeopardy and the argument that conviction under the felony murder aspect of § 39-2-202 required an automatic or mandatory death penalty because the jury had already found beyond a reasonable doubt the existence of an aggravating circumstance at the guilt phase of the trial. These arguments were rejected by the Court. *State v. Barnes*, 703 S.W.2d 611, 618 (Tenn. 1985); *State v. Laney*, 654 S.W.2d 383, 387 (Tenn. 1983); *State v. Pritchett*, 621 S.W.2d 127, 139-40 (Tenn. 1981); *Houston v. State*, 593 S.W.2d 267, 276 (Tenn. 1980). Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, *see* Tenn. Code

Ann. § 40-35-111 (1982) and § 40-35-114 (1990), and we are of the opinion that Article I, § 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well.

Our sister state of North Carolina has accepted the double-counting challenge to its death penalty statute, which contained similar duplicative aggravating circumstances. In *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), the North Carolina Supreme Court pointed out that their felony murder aggravating circumstance would always be supported by the evidence in a felony murder conviction, since the felony murder, by definition, must have occurred during the commission or attempted commission of one of the enumerated felonies. *Id.*, 298 N.C. at 112, 257 S.E.2d at 567. The North Carolina court held:

> The problem here presented arises because [the felony murder aggravating] circumstance is inherent in, and a necessary element of, the capital felony, to-wit, felony murder.
>
> . . . A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived.
>
> . . . .

> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first-degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.

State v. Cherry, 298 N.C. at 113, 257 S.E.2d at 567-68. *See also, State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981); *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981).

In *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), the United States Supreme Court said that in order to comply with the Eighth Amendment, aggravating circumstances must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.*, 462 U.S. at 877, 103 S. Ct. at 2742, 77 L. Ed. 2d at 249-50. It seems obvious that Tennessee's statute fails to narrow the class of persons eligible for the death penalty because:

> Automatically instructing the sentencing body on the underlying felony in a felony-murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since

all participants in a felony-murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.

. . . .

A comparison of the sentencing treatments afforded first-degree-murder defendants further highlights the impropriety of using the underlying felony to aggravate felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically charged against him. This disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

Engberg v. State, 686 P.2d 541, 560 (Wyo. 1984) (Rose, J., dissenting) *See also Wiley v. Mississippi*, 497 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986) (Marshall, J., dissenting); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991) (adopting Justice Rose's position).

In his thoughtful article analyzing the jurisprudence of death, Professor Richard Rosen correctly notes that the movement by the U.S. Supreme Court to constitutionally narrow the class of persons eligible for the death penalty began in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), a case in which a majority of the Justices held the existing systems of capital punishment constitutionally deficient at that time. Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103, 1106 (1990). The pre-*Furman* capital sentencing statutes in the various states were similar in that the defendant was made eligible for capital

punishment by the substantive law of homicide. *Id.*, 31 B.C. L. Rev. at 1107. After a guilty finding, then the sentencer, usually as part of the same proceeding, was given unfettered discretion to impose the death penalty. *Id.*, 31 B.C. L. Rev. at 1107-08. The Justices in the majority in *Furman* focused on the random, arbitrary, capricious, and discriminatory application of the death penalty under these statutes. *Id.*, 31 B.C. L. Rev. at 1108.

In reviewing the statutes passed by states since *Furman*, the Court's focus has been on the process of selecting those to be killed, with the over-arching goal of ensuring that those defendants chosen for execution be in some way worse, or materially more depraved, than those other first-degree murderers not executed. *Id.*, 31 B.C. L. Rev. at 1109-10 (citing *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S. Ct. 1759, 1767, 64 L. Ed. 2d 398, 409 (1980)). The Court has relied primarily on procedural protections to realize its Eighth Amendment goals. *Id.*, 31 B.C. L. Rev. at 1110. A state first must narrow the class of homicide defendants who are eligible for the death penalty to ensure that even if some materially more depraved murderers manage to avoid the death penalty, those chosen will, at least, be among the worst offenders. *Id.* This narrowing, however, is insufficient by itself to satisfy the Eighth Amendment. *Id.*

The Court has prohibited a mandatory death penalty for even the narrowest class of murder defendants. *See, e.g., Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987). Instead, after restricting the class of death-eligible offenses, a state must utilize additional procedures that assure reliability in the determination

that death is the appropriate punishment in a given capital case. *Woodson v. North Carolina,* 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

To meet this reliability requirement, a state must permit the sentencer to make an individualized determination on the basis of the character of the individual and the circumstances of the crime. *Zant v. Stephens, supra,* 462 U.S. at 879, 103 S. Ct. at 2744, 77 L. Ed. 2d at 251 (1983). The defendant thus is entitled to present and have the sentencer fully consider all relevant evidence in mitigation of sentence. *Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S. Ct. 1669, 1670-71, 90 L. Ed. 2d 1, 6 (1986). The state also is allowed, but not required, to present a wide range of evidence in aggravation, as long as it is relevant to the sentencing decision and promotes the reliability of that determination. *See, e.g., Barefoot v. Estelle,* 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). In theory, both the restriction of discretion attendant upon the narrowing requirement and the increase in discretion caused by the full and unfettered consideration of mitigation, serve the underlying goal of weeding out those who do not convincingly deserve the death penalty. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death,* 31 B.C. L. Rev. at 1111.

As a constitutionally necessary first step under the Eighth Amendment, the Supreme Court has required the states to narrow the sentencers' consideration of the death penalty to a smaller, more culpable class of homicide defendants than the pre-*Furman* class of death-eligible murderers. *See Pulley v. Harris,* 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). A state, however, must not

only genuinely narrow the class of death eligible defendants, but must do so in a way that reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Zant v. Stephens, supra,* 462 U.S. at 877, 103 S. Ct. at 2742, 77 L. Ed. 2d at 249-50. A proper narrowing device, therefore, provides a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not, *Godfrey v. Georgia, supra,* 446 U.S. at 433, 100 S. Ct. at 1767, 64 L. Ed. 2d at 409, and must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed. *Zant, supra,* 462 U.S. at 879, 103 S. Ct. at 2744, 77 L. Ed. 2d at 251. As a result, a proper narrowing device insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers – those whose crimes are particularly serious, or for which the death penalty is peculiarly appropriate. *See Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

The critical role played by this narrowing requirement is especially significant in light of the discretion which the Court has mandated for the sentencing body in a capital case. Because a capital sentencer now must be allowed wide discretion – a discretion not unlike that used before *Furman* – to impose a life sentence based upon any mitigating evidence concerning the character of the defendant or the circumstances of the crime, the sentencer should be restricted to using this discretion on a class of murderers that is demonstrably smaller and

more blame worthy than the class of pre-*Furman* murderers eligible for the death penalty.

States have adopted different methods to narrow the class of death-eligible defendants, but in the large majority of states, the class is narrowed by aggravating circumstances. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. at 1122. Tennessee has not chosen to narrow the class of death-eligible defendants by re-defining its murder statute, but rather has chosen to do so by listing a number of specific aggravating factors and expressly requiring the finding of a least one aggravating circumstance beyond a reasonable doubt before the death penalty can be imposed. It joins 24 other states in that requirement. Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1129, 1240, n. 732 (1984).

A few states have chosen to narrow the class of death-eligible defendants by providing restrictive definitions of first-degree, or capital, murder. Rosen, *Felony Murder*, 31 B.C. L. Rev. at 1123. In *Lowenfield v. Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), the Supreme Court approved this alternative approach, holding that no requirement existed for narrowing the class at the sentencing stage, provided that the class of death-eligible defendants is, in fact, genuinely narrowed at the definitional stage. *Id.*, 484 U.S. at 244-46, 108 S. Ct. at 554-55, 98 L. Ed. 2d at 581-83. Recognizing that Tennessee has not chosen to narrow at the definitional stage, it should be noted that the legislature has, in fact, broadened its first-degree murder statute by adding death by child abuse, which makes the class even larger than pre-*Furman*. *See* Tenn. Code Ann. § 39-2-202(a)(2) (Supp.

1988) and Tenn. Code Ann. § 39-13-202(a)(4) (1991). *But see State v. Hale*, ___ S.W.2d ___ (Tenn. 1992), in which this Court held the statute unconstitutionally deprived the defendant of due process under Article I, § 8(a) of the Tennessee Constitution.

In addition to having different methods for narrowing the class of death eligible defendants, states have different definitions of first-degree felony murder. As noted earlier, some states are pure felony murder states; that is, they allow the defendants to be sentenced to death solely because the killing took place during an accompanying felony. Tennessee was one of those states before 1989[7]. In these states, a defendant first can be convicted of first-degree murder because of the felony. Then, the defendant can be sentenced to death because the felony is used as an aggravating circumstance, unqualified at either stage by any *mens rea* requirement. Rosen, *Felony Murder*, 31 B.C. L. Rev. at 1125-26.

Rosen points out that in those states, which includes Tennessee,

> the felony murder narrowing device fails to meet both the quantitative and qualitative requirements for a narrowing device. It provides no meaningful narrowing and, to the extent that narrowing does exist, it does not serve to identify the defendants most deserving of death. In

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[7] The Tennessee legislature amended its capital punishment statute, effective November 1, 1989, to require recklessness during the felony before death can be imposed, thereby removing Tennessee from the class of pure felony murder states. *See supra* note 6 and accompanying text.

> these states, felony murderers are treated essentially the same as they were pre-*Furman* . . . the simple fact of the accompanying felony makes the defendant death-eligible [and] the jury then can exercise its unfettered discretion to determine whether defendant is to live or die.

Id., 31 B.C. L. Rev. at 1127.

Commentators have always criticized the felony murder rule for its bootstrapping effect. *Id.* It vaults an offense into the class of murders without the malice finding usually required, and then, still without any culpability finding, elevates what otherwise might not be a murder to first-degree murder. *Id.* In addition, in pure felony murder states, such as Tennessee before 1989, a third level of bootstrapping arises as the felony murder defendant is moved up into the supposedly restricted class of defendants eligible for death. *Id.*

The perverse result of the felony murder narrowing device is even more troubling because the usual class of first-degree murderers is made up largely of two groups of defendants – felony murderers and premeditated and deliberated murderers. The only defendants who are eliminated by the felony murder narrowing device are those who kill with premeditation and deliberation – i.e., in cold blood – but not during the course of a felony. A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability.

A few states qualify their felony murder narrowing devices by requiring that the defendant possess a specified *mens rea* of recklessness or culpable negligence at either the guilt or sentencing stage. Tennessee has done so since 1989. *See* 1989 Tenn. Pub. Acts, ch. 591, § 1. All felony murderers, however, potentially meet a recklessness standard; that is, one who purposely undertakes a felony that results in a death, almost always can be found reckless. Therefore, the narrowing devices in these states are essentially no different from those in the pure felony murder states.

Furthermore, the Supreme Court case of *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), now places a nationwide threshold of culpability at the reckless indifference level, meaning that a defendant who acts without reckless indifference is not constitutionally eligible for the death penalty. *Id.*, 481 U.S. at 157-58, 107 S. Ct. at 1687-88, 95 L. Ed. 2d at 144-45. Therefore, since the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants.

In *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), the 8th Circuit Court of Appeals relied on *Zant, supra*, and the principles of *Godfrey, supra*, to hold that duplication by an aggravating circumstance of the underlying capital felony violated the Eighth Amendment of the U.S. Constitution.[8] The Court commented:

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[8] *Collins* involved the Arkansas death penalty statute existing in 1974, which defined certain kinds of murder as capital,

The question, rather, is whether use of an aggravating circumstance that duplicates an element of crime itself is a violation of the Eighth Amendment, as applied to the states by the Due Process Clause of the Fourteenth Amendment. Two recent Supreme court opinions, *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion), and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), clearly indicate that such a violation has occurred here. Aggravating circumstances, in order to comply with the Eighth Amendment, must "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.* 103 S.Ct. at 2742-43 (footnote omitted). An aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime. Aggravating circumstances serve to reduce the danger that the death penalty will be wantonly or arbitrarily imposed, a danger that was uppermost in the Court's mind when *Furman v. Georgia* . . . was decided. . . .

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and used aggravating circumstances to let the jury determine whether the death penalty should be imposed. *Collins* was subsequently deemed to have been overruled by *Lowenfield v. Phelps, supra,* on the basis that the Arkansas statute sufficiently narrowed the class of death eligible defendants by narrowly defining capital murder. *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir. 1989).

> We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.

Id., 754 F.2d at 263-64.

This Court has previously refused to follow the *Collins* rationale by finding it inapplicable under the Tennessee Constitution. *See State v. Smith*, 755 S.W.2d 757, 768 (Tenn. 1988); *State v. King*, 694 S.W.2d 941, 946 (Tenn. 1985); *State v. Laney*, 654 S.W.2d 383, 387 (Tenn. 1983), and *State v. Pritchett*, 621 S.W.2d 127, 139-40 (Tenn. 1981). In *State v. Smith, supra,* the Court's reason for rejecting the *Collins* rationale was as follows:

> This precise question, however, was before the Supreme Court of the United States in *Lowenfield v. Phelps*, 484 U.S. 321, 108 S. Ct. 546, 98 L.Ed.2d 568 (1988), *cert. granted* 483 U.S. 1005, 107 S.Ct. 3227, 97 L.Ed.2d 734 (1987). There the Court upheld the position that we have taken herein and in *Pritchett* and *King, supra,* that use of the underlying felony, in this case armed robbery, as an aggravating circumstance upon which the jury may base a death penalty is constitutionally permissible.

Id., 755 S.W.2d at 768.

The difficulty with that conclusion is that in *Lowenfield v. Phelps, supra,* the United States Supreme Court held that the Louisiana death penalty statute sufficiently narrowed the class of death eligible murderers by narrowly defining capital murder so that the class of death eligible defendants did not have to be further narrowed by aggravating circumstances. 484 U.S. at 244-46, 108 S.

Ct. at 554-55, 98 L. Ed. 2d at 581-83. Since the statute sufficiently narrowed the class of death eligible by narrowly defining capital murder, the Court upheld the constitutionality of the Louisiana statute, despite the fact that the sole aggravating circumstance found was identical to an element of the capital crime of which the petitioner had been convicted. *Id.*

In upholding the Louisiana statute, the Court concluded that the narrowing function required may be performed by jury findings at either the sentencing phase of the trial or the guilt phase, and that the legislature may itself narrow the definition of capital offenses, as Louisiana has done, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *Id.*, 484 U.S. at 244-45, 108 S. Ct. at 554, 98 L. Ed. 2d at 581-82.

It is clear that Tennessee has a broad definition of murder and has not narrowed in the definitional stage. Accordingly, *Lowenfield* is inapposite and provides no rationale for constitutionality under the Tennessee Constitution.

We have determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, no narrowing occurs under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn. Code Ann. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991), does

not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense. As a result, we conclude that Tenn. Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder. Accordingly, we expressly overrule *State v. Smith*, 755 S.W.2d 757 (Tenn. 1988), and its progeny on this issue.

As stated at the beginning of this Opinion, under our holding today, felony murder continues to be a death-eligible offense. However, a finding of an aggravating circumstance other than Tenn. Code Ann. § 39-2-203(i)(7) (1982) and § 39-13-204(i)(7) (1991) is necessary to support death as a penalty for that crime.

Because, in this case, the jury has found two aggravating circumstances are supported by the evidence beyond a reasonable doubt, it is necessary for this case to be remanded for re-sentencing. Even though the evidence amply supports the aggravating circumstance of the murder being especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn. Code Ann. § 39-2-203(i)(5) (1982), we are unable to conclude that the elimination of the aggravating circumstance (i)(7) is harmless error beyond a reasonable doubt. Therefore, we remand this case for re-sentencing where the State will be

free to reseek the death penalty if it so desires. The costs of this appeal are taxed to the State of Tennessee.

/s/ E. Riley Anderson
E. RILEY ANDERSON,
Justice

Drowota and O'Brien, JJ., concurring in Parts I and II and dissenting in Part III. See separate Opinion.

Reid, C.J., and Daughtrey, J., concurring in Parts I and III and dissenting in Part II. See separate Opinion.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Plaintiff-Appellee, V. DONALD RAY MIDDLEBROOKS, Defendant-Appellant.	FOR PUBLICATION DAVIDSON CRIMINAL Hon. Ann Lacy Johns, Judge. S/C No. 01S01-9102-CR-00008 (Filed Sept. 8, 1992)

CONCURRING AND DISSENTING OPINION

I would affirm the Defendant's conviction of first-degree felony murder and his sentence of death; therefore, I concur in part and dissent in part. I concur with Part I of Justice Anderson's majority opinion, in which all members of this Court find that there is no error in the guilt phase. I also concur with Part II of Justice Anderson's opinion, in which he finds the death penalty may constitutionally be imposed upon conviction under the felony-murder statute, T.C.A. § 39-2-202(a) (1982). As the majority opinion reveals, the Defendant did not raise the issue of the constitutionality of Tennessee's death penalty statute as punishment for felony murder. However, we wish to address this question because the present Court has not yet considered this important issue. As members of the former Court, Justice O'Brien and I have previously upheld the constitutionality of capital punishment for felony murder. Today, a three-member majority of the present Court reaffirms the prior holdings of this Court on this issue, beginning with *State v. Dicks*, 615 S.W.2d 126 (1981).

I would like to acknowledge that, although prior decisions of this Court have held the death penalty in felony murder to be constitutional, no former opinion of this Court has articulated in such depth and scholarly manner the issue now before us, as has Justice Anderson in Part II of this opinion. The dissent of Chief Justice Reid, joined by Justice Daughtrey, to Part II of the majority opinion states: "[T]he statute still does not effectively limit the class of *death-eligible* defendants (which is a group different from those actually executed) to those most deserving of death as punishment and, therefore, it violates the Tennessee constitutional prohibition against cruel and unusual punishment." I respond only by saying I respectfully disagree with the analysis found in the dissent filed by my colleagues, including the simplistic categorization of cases based on the presence of intent to kill.

I dissent from Part III of the majority opinion which holds that use of the aggravating circumstance in T.C.A. § 39-2-203(i)(7) (1982) [now §39-13-204(i)(7) (1991)] to impose a sentence of death in cases of felony murder violates the Eighth Amendment to the United States Constitution and Article I, §16, of the Tennessee Constitution. This same position, under the various guises of double jeopardy, mandatory death penalty and inadequate narrowing, has previously been rejected by this Court. *See, e.g., State v. Smith,* 755 S.W.2d 757, 768 (Tenn. 1988); *State v. Barnes,* 703 S.W.2d 611, 618 (Tenn. 1985); *State v. Zagorski,* 701 S.W.2d 808, 816 (Tenn. 1985); *State v Smith,* 695 S.W.2d 954, 959-960 (Tenn. 1985); *State v. King,* 694 S.W.2d 941, 946 (Tenn. 1985); *State v. Laney,* 654 S.W.2d 383, 387 (Tenn. 1983); *State v. Pritchett,* 621 S.W.2d 127,

139-141 (Tenn. 1981); *Houston v. State,* 593 S.W.2d 267, 276 (Tenn. 1980). In *State v. Pritchett,* 621 S.W.2d at 140-141, the Court rejected the rationale of *State v. Cherry,* 298 N.C. 86, 257 S.E.2d 551 (1979), now adopted by the Court; and in *State v. Smith,* 755 S.W.2d at 768, we held that our statute complied with the constitutional requirement of "narrowing" under *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

No intervening law compels that we abandon these former decisions. I find disturbing the tendency of members of this Court to disregard long established precedents in capital punishment decisions. Consistency in the law is of utmost importance, particularly in this area of the law. Inconsistency creates questions and concerns that leave the bench and bar without any confidence that what was said yesterday will hold true for tomorrow.

My disagreement with the majority is not based solely on the principle of *stare decisis,* however. It also arises from my conviction that these previous decisions are not in error and that the statute does not contravene the requirements of either the Eighth Amendment or Article I, §16. As was pointed out in *Pritchett,* the United States Supreme Court has implicitly approved an identical application of the felony element of the offense of felony murder as a valid aggravating circumstance for imposition of the death penalty in *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). There the Court held that the Florida capital sentencing system, upon which our statute was in part closely modeled, on its face satisfied the constitutional deficiencies identified in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Cf. Gregg v. Georgia,* 428 U.S. 153, 196

S.Ct. 2909, 49 L.Ed.2d 859 (1976) (upholding death penalty under Georgia statute effectively allowing similar duplication under the facts of the case). The United States Supreme Court has also explicitly held that there is no Eighth Amendment prohibition against using an element necessary to the conviction of first-degree murder as an aggravating circumstance to support the death penalty. *Lowenfield v. Phelps, supra; see also State v. Cauthern*, 778 S.W.2d 39, 47 (Tenn. 1989).

The majority, however, finds that the statute fails to "narrow" the class of death eligible defendants sufficiently to satisfy the cruel and unusual clauses of the two constitutions because, in the case of felony murder, the statute returns our sentencing scheme to the days before *Furman*, when the jury was given unfettered discretion to determine who lived and who died. This is neither a correct assessment of the statute nor of *Furman* and its progeny. The concern in *Furman* was that the death penalty not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia*, 428 U.S. at 188, 96 S.Ct. at 2932. Its guiding principle was that the sentencer's discretion must be suitably directed and limited and must be exercised in an informed manner. *Id.* at 189, 96 S.Ct. at 2932. The sentencer must have relevant information under fair procedural rules and be provided with standards to guide its use of this information. *Id.* at 195, 96 S.Ct. at 2935. As stated in *Proffitt v. Florida*, "the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus

eliminating total arbitrariness and capriciousness in its imposition." 428 U.S. at 258, 96 S.Ct. at 2969.

Furman nowhere mentions the concept of "narrowing" as understood by the majority. Aggravating factors are considered "means of confining the sentencers' discretion – giving them something specific to look for rather than leaving them to wander at large among all aggravating circumstances." *Walton v. Arizona*, 497 U.S. ___, ___, 110 S.Ct. 3047, 3063, 111 L.Ed.2d 511 (1990) (Scalia, J., concurring). So long as the aggravating circumstance is not unconstitutionally vague, i.e., so vague as to fail adequately to channel the sentencing patterns of juries, it may serve as the basis for imposing capital punishment. *See Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983).

But aggravating factors are not the only component of a capital sentencing system assuring that the commands of *Furman* are met. The system must be examined as a whole just as it works as a whole. In addition to aggravating factors, our statute further guides and channels the sentencer's discretion by providing a bifurcated proceeding, requiring consideration of mitigating circumstances, explicitly directing the manner in which the jury must weigh the various sentencing factors, and mandating meaningful appellate review. *See Zant v. Stephens*, 462 U.S. at 875, 103 S.Ct. at 2741; *Proffitt v. Florida*, 428 U.S. at 252-253, 96 S.Ct. at 2967; *Gregg v. Georgia*, 428 U.S. at 191, 96 S.Ct. at 2933. The cumulative effect of these procedural safeguards assures that our statute's use of the underlying felony as an aggravating circumstance does not violate the principles of *Furman*.

As its reliance on the quoted language from *State v. Cherry* discloses, the majority decision is based to a large extent upon the potential problems of disproportionality inherent in allowing capital punishment for felony murder. Allowing the underlying felony to act as an aggravating circumstance does not, however, result in imposition of the death penalty in a disproportionate manner. First of all, it is well-settled that under the Eighth Amendment death is not a disproportionate punishment for felony murder so long as the defendant in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used, or the defendant was a major participant in the felony and exhibited reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376-3377, 73 L.Ed.2d 1140 (1982). Yet the majority's decision removes wholesale this category of persons[1], unquestionably death eligible under the Eighth Amendment, from the list of those upon whom the state can impose capital punishment unless some factor beyond the commission of the felony is present in the crime. I cannot, however, consider "unreasonable, unjust or unconstitutional" the legislature's determination that killings perpetrated during a felony occur under circumstances of enhanced culpability sufficient to expose the perpetrator and certain accomplices to a death sentence. *See Whalen v. State*, 492 A.2d 552, 567 (Del. 1985). I believe

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[1] *See, e.g., State v. Smith*, 695 S.W.2d 954 (1985); *State v. Matson*, 666 S.W.2d 41 (Tenn. 1984); *State v. Laney*, 654 S.W.2d 383 (Tenn. 1983); *State v. Simon*, 635 S.W.2d 498 (Tenn. 1982). In the above felony murder cases, the sole aggravating factor was (i)(7).

that, applied under the constitutional restrictions set forth in *Tison* and *Enmund*, T.C.A. §39-2-203(i)(7) constitutionally narrows the category of death eligible defendants in the case of felony murder at the sentencing stage. To the extent that the majority's decision rests upon concerns that the death penalty is disproportionate punishment for some types of conduct falling under the felony murder statute, our sentencing system, created to meet the mandates of *Furman*, may be trusted to discern and remove those persons perpetrating these less egregious forms of felony murder from the list of those condemned to death.

It is here that this Court's obligations under T.C.A. §39-13-206 [formerly §39-2-205] become critical. In order to prevent the execution of all but the most deserving of murderers and to avoid arbitrary and capricious sentencing, the Court reviews all felony-murder cases to assure that a sentence of death has not been arbitrarily imposed, that the evidence supports the jury's findings and that the sentence of death is not disproportionate. For purposes of the death penalty, a distinction must be drawn in felony-murders between cold-blooded, execution-style murders and accidental, unforeseen killings or accomplice killings. However, the mechanical narrowing adopted by the Court today bears no relationship to these considerations.[2] Following a jurisprudence of case

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[2] In disallowing the jury from considering aggravating circumstance (i)(7) at the sentencing stage in all felony murder convictions, over one third of the persons on death row may have their sentences reviewed, first for a harmless error analysis, and upon a finding of harmful error as in this case, then for a remand to the trial court for resentencing.

specific proportionality review, on the other hand, ensures that the dictates of the Eighth and Fourteenth Amendments and their state counterparts, Article I, §§ 16 and 8, are met in capital felony murders.

Applying these principles to the present case, I would find: that the sentence of death was not imposed in an arbitrary fashion; that the evidence supports the jury's findings of two statutory aggravating circumstances; and that the evidence supports the jury's finding of the absence of mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances so found. The sentence is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the Defendant. *See State v. Alley*, 776 S.W.2d 506 (Tenn. 1989); *State v. Miller*, 771 S.W.2d 401 (Tenn. 1989); *State v. West*, 767 S.W.2d 387 (Tenn. 1989); *State v. Hartman*, 703 S.W.2d 106 (Tenn. 1985); *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983); *State v. Groseclose*, 615 S.W.2d 142 (Tenn. 1981). The defendant's culpability also meets the criteria of *Tison* and *Enmund*, *supra*. The aggravating circumstances applied are constitutionally valid. This torture-murder of a kidnapped child unquestionably is one of the most aggravated killings that this Court has seen. The fourteen-year-old victim's ordeal, as described in the majority opinion, began at 7:30 p.m. and ended at 11 p.m. This brutal and tragic murder is certainly one of the "worst of the bad."

I would affirm the judgment both as to the defendant's guilt and his sentence of death. I am authorized to state that Justice O'Brien concurs in this opinion.

/s/ Frank F. Drowota, III
FRANK F. DROWOTA, III
JUSTICE

Concurs:

O'Brien, J.

FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	Davidson Criminal
Plaintiff-Appellee,	)	Hon. Ann Lacy Johns, Judge
v.	)	
DONALD RAY MIDDLEBROOKS,	)	S.C. No. 01S01-9102-CR-00008
Defendant-Appellant.	)	(Filed Sept. 8, 1992)

CONCURRING AND DISSENTING OPINION

I concur in Part I of the majority Opinion affirming the conviction of first degree murder.

My position with regard to Part II is that even if the death penalty is not *per se* cruel and unusual punishment prohibited by Article I, Section 16 of the Tennessee Constitution, the imposition of death upon a conviction of felony murder is not a single constitutional issue that can be resolved "in the abstract"; Article I, Section 16 imposes a standard of proof higher than the federal standard of reckless indifference; and, therefore, T.C.A. § 39-2-203 (1982), as construed in the majority Opinion violates Article I, Section 16.

I concur in Part III of the majority Opinion's holding that the use of felony murder as an aggravating circumstance when the offense of which the defendant is convicted is felony murder does not accomplish the constitutional objective of narrowing the class of death-eligible murderers, and therefore T.C.A. § 39-13-204(i)(7) is constitutionally invalid.

This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a "demonstrably smaller and more blameworthy" class of murderers. *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853 (1988). However, even with the felony murder aggravating circumstance eliminated, the Tennessee sentencing statute still includes in the class of death-eligible defendants accidental and unintentional murderers whose culpability is minimal. It still allows convictions for first degree felony murder of persons who killed accidentally or unintentionally and those who did not kill, did not intend to kill and did not intend that any person suffer any physical harm. The statute still does not effectively limit the class of *death-eligible* defendants (which is a group different from those actually executed) to those most deserving of death as punishment and, therefore it violates the Tennessee constitutional prohibition against cruel and unusual punishment. Consequently, the statute falls short of the constitutional mandate that the death penalty be imposed upon only those murderers who are the "worst of the bad."

The evil identified by the United States Supreme Court cases construing and implementing the Eighth Amendment prohibition against cruel and unusual punishment is not the death penalty itself but, as discussed in the majority Opinion, the random, arbitrary, capricious, and discriminatory application of the death penalty. So long as a state under its law elects to impose the death penalty, the United States Constitution mandates fairness and proportionality in the imposition. The procedure followed by a state must, as stated in *Lowenfield v. Phelps*,

484 U.S. 231, 108 S. Ct. 546, 554 (quoting *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733 (1983)), "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." The constitutional objective is that the sentence imposed "reflect a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 841 (1987)) (concurring opinion) (emphasis in original).

The United States Supreme Court has recognized that this "reasoned moral response" is determined by "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 99, 78 S. Ct. 590, 597, 2 L.Ed.2d 630 (1958). *See State v. Black*, 815 S.W.2d 166, 188 (Tenn. 1991). The standards of decency are reflections of the essential character of the people of the state, their virtues, their faults. To be constitutional, the process must insure the effective application of society's present standards of decency. Implicit in death penalty jurisprudence is the recognition that the standards of decency are not static but evolving, that society is not stale but maturing, and that the level of community morality will continue to rise until the reasoned moral response of the people of Tennessee will be, if it is not already, that the death penalty is cruel and unusual punishment. Until that standard is recognized, the focus must be on fairness and proportionality among those that the process allows to be executed.

The process whereby the death penalty may be imposed in Tennessee consists of three stages – the determination that the defendant is not in a category of murderers upon whom the death penalty may not be imposed regardless of the other circumstances of the case; the minimum proof regarding the defendant and the crime that will support a jury's imposition of the death penalty; and the comparative proportionality review on appeal mandated by statute.

Certain categories of defendants are not subject to the death penalty regardless of the circumstances of the murder. T.C.A. § 39-13-204 limits the imposition of the death penalty to the offense of first degree murder. T.C.A. § 39-13-203 prohibits the imposition of a sentence of death upon any mentally retarded defendant. T.C.A. § 37-1-134(a)(1)(A) protects juveniles from the sentence of death. This decision adds to those categories in which the defendant is not death-eligible: those charged only with felony murder with felony murder as the only aggravating circumstance.

The second stage is the jury trial. Juries may impose the death penalty only upon those defendants who are members of the class of death eligibles. In cases in which the defendant is not in a category exempt from the sentence of death, the minimum standards for determining whether a sentence of death may be constitutionally imposed for felony murder under the federal constitution are those set by the United States Supreme Court in *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L.Ed.2d 127 (1987). Those cases dealt with the

problem of imposing the death penalty in cases of vicarious liability for felony murder, i.e., where an accomplice in the felony, one who did not actually kill the victim, is convicted of murder under the felony murder doctrine and receives the death penalty. Under the rules of those cases the death penalty is only permissible under the Eighth and Fourteenth Amendments for one who himself kills, attempts to kill, or intends that a killing take place or that lethal force will be imposed (*Enmund*), or for one whose personal involvement in the underlying felony is substantial and who exhibits a reckless disregard or indifference to the value of human life (*Tison*).

As discussed in the majority Opinion, Tennessee does not narrow the death eligible class by the statutory definition of first-degree felony murder. Under the Tennessee felony statute, proof of malice, deliberation, and premeditation, or that the defendant intended to kill the victim, is not necessary to support a death sentence. *State v. Johnson*, 661 S.W.2d 854, 861 (Tenn. 1984); *Farmer v. State*, 201 Tenn. 107, 296 S.W.2d 879 (1956); *State v. Hopper*, 695 S.W.2d 530, 535 (Tenn. Crim. App. 1985); *Tosh v. State*, 527 S.W.2d 146, 147-48 (Tenn. Crim. App. 1975). Consequently, there are included in the class of death-eligible felony murderers those who killed accidentally or unintentionally and those who did not kill, did not intend to kill, and did not intend that any person suffer physical harm. Since the felony murder statute by definition does not narrow the class of death-eligible defendants, narrowing must be accomplished, if at all, at the sentencing phase of the trial when the jury, pursuant to T.C.A. § 39-13-204(i)(j), considers the relevant aggravating and mitigating circumstances.

The majority Opinion presents a compelling case for its conclusion that to be constitutional a sentencing process must insure that only those defendants "most deserving" will be executed. It states that in selecting those defendants to be executed the over-reaching goal is to insure that those chosen be in some way worse or materially more depraved than those other first degree murderers not executed. *See* majority Opinion at ___. The Opinion recognizes that in order to pass constitutional muster the procedure "first must narrow" the class of death-eligible defendants to insure that those executed "will be among the worst offenders," and, further, acknowledges that the reckless indifference standard accomplishes no meaningful limitation on the class of defendants eligible for the death penalty. However, rather than stating the quantum of proof required by the constitution to genuinely narrow the class of death eligibles and thus support a jury verdict imposing the death sentence, it invalidates as unconstitutional only that section of the statute that allows felony murder as an aggravating circumstance for the conviction of felony murder. The rationale is that "T.C.A. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991) do not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U. S. Constitution and Article I, Section 16 of the Tennessee Constitution because they duplicate the elements of the offense." *Id.* at ___. It should be noted that the constitutional deficiency is that the aggravating circumstance does not narrow the class, not that it duplicates the elements of the offense. Justice Drowota's dissent misses this essential point, stating, "There is no constitutional prohibition against using an element of the

offense as an aggravating circumstance." Drowota, J., dissenting at ___. The result then is illogical: an aggravating circumstance that fails to narrow the class because it duplicates the elements of the offense is unconstitutional, but aggravating circumstances that fail to narrow the class for other reasons are not unconstitutional. The logical conclusion from the majority Opinion's analysis would be that any provision of the statute that fails to accomplish the constitutional imperative to narrow the class is invalid.

The opinion acknowledges that the felony murder doctrine has been severely criticized as being harsh and unjust and that in most jurisdictions in which felony murder has not been abolished, the death penalty can be imposed only where killings perpetuated during felonies are intentional, deliberate, purposeful, or knowing. *Id.* at ___. The Opinion, however, finds that death as a penalty for felony murder conforms with contemporary standards of decency in Tennessee and, therefore, that "in the abstract" the sentence of death for felony murder is not *per se* cruel and unusual punishment. The standards of decency supporting this conclusion, the Opinion says, are evidenced by the act of the legislature enacting the statute and the acts of juries imposing that penalty in felony murder cases. At the appropriate time, this subject should be fully discussed. Perhaps sufficient for the present are the observations that the legislature is essentially a political body and that citizens who refuse to consider the sentence of death as punishment are disqualified as jurors. In addition, the legislature enacted that portion of the statute, T.C.A. § 39-13-204(i)(7), found by the majority Opinion to be unconstitutional and the jury imposed the

sentence of death on the defendant in this case based upon that statute. This evidence hardly supports the conclusion that imposing the death penalty upon a felony murder conviction does not *per se* violate Article I, Section 16. More importantly, that conclusion does not preclude consideration of those cases in which the imposition of the death penalty does constitute cruel and unusual punishment and it does not relieve the Court of the responsibility for determining the proof necessary to support a jury's sentence of death. Without this standard, prosecutors can continue to seek the death penalty and juries can continue to impose the death penalty upon no greater proof than that of reckless indifference.

In determining that standard, the Court need look no further than its reported decisions. Without independently examining the requirements of the state constitution, this Court has, by its decisions, recognized a higher standard of culpability than that of reckless indifference set by the United States Supreme Court. Analysis of our cases indicates that this Court, while not specifically adopting a bright-line rule, has found that a felony murderer is death eligible only where the killing is deliberate or intentional or accompanied by a conscious purpose of producing death or a conscious realization that death will likely occur. Since 1979, this Court has reviewed and released opinions in approximately 84 cases in which the jury imposed a sentence of death. Review of these opinions shows that the sentence was clearly based only on a conviction of felony murder in 28 cases.[1] The proof in 16

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[1] *State v. Boyd*, 797 S.W.2d 589 (Tenn. 1990); *State v. Cauthern*, 778 S.W.2d 39 (Tenn. 1989); *State v. Taylor*, 774 S.W.2d 63

of those 28 cases shows an intent to kill.[2] In six of the cases proof of the method of killing or other evidence would support a finding of intent to kill,[3] even though the issue was disputed. Two cases involved struggles in which the intent to kill was not clearly shown,[4] in one case the defendant confessed to the killing,[5] and one case is on remand.[6] In only two of the 28 felony murder convictions is the intent to kill seriously in doubt.[7]

(Tenn. 1989); *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988); *State v. Hines*, 758 S.W.2d 515 (Tenn. 1988); *State v. Smith*, 755 S.W.2d 757 (Tenn. 1988); *State v. Poe*, 755 S.W.2d 41 (Tenn. 1988); *State v. Barber*, 753 S.W.2d 659 (Tenn. 1988); *State v. Bobo*, 727 S.W.2d 945 (Tenn. 1987); *State v. Sparks*, 727 S.W.2d 480 (Tenn. 1987); *State v. King*, 718 S.W.2d 241 (Tenn. 1986); *State v. Goad*, 707 S.W.2d 846 (Tenn. 1986); *State v. Barnes*, 703 S.W.2d 611 (Tenn. 1985); *State v. Hartman*, 703 S.W.2d 106 (Tenn. 1985); *State v. Smith*, 695 S.W.2d 954 (Tenn. 1985); *State v. King*, 694 S.W.2d 941 (Tenn. 1985); *State v. McKay*, 680 S.W.2d 447 (Tenn. 1985); *State v. Sample*, 680 S.W.2d 447 (Tenn. 1985); *State v. Sheffield*, 676 S.W.2d 542 (Tenn. 1984); *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984); *State v. Matson*, 666 S.W.2d 41 (Tenn. 1984); *State v. Campbell*, 664 S.W.2d 281 (Tenn. 1984); *State v. Laney*, 654 S.W.2d 383 (Tenn. 1983); *State v. Simon*, 635 S.W.2d 498 (Tenn. 1982); *State v. Strouth*, 620 S.W.2d 467 (Tenn. 1981); *State v. Coleman*, 619 S.W.2d 112 (Tenn. 1981); *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981); *State v. Cozzolino*, 584 S.W.2d 765 (Tenn. 1979).

[2] *Cauthern; Taylor; Hines; Barber; Sparks; King* (1986); *King* (1985); *McKay; Sample; Sheffield; Matson; Campbell; Simon; Strouth; Dicks; Cozzolino.*

[3] *Poe, Bobo; Goad; Laney; Hartman; Workman.*

[4] *Boyd; Smith* (1985).

[5] *Coleman.*

[6] *Smith*, (1988).

[7] *Irick; Barnes.*

The conclusion to be gathered from a review of these cases is that the jury verdicts imposing the death penalty upon convictions of felony murder were supported by proof that the killings were the proximate result of acts accompanied by an intent to kill, a conscious purpose to produce death, or a conscious realization that death likely would occur. This standard requires an intent with respect to the *killing*, not just the underlying felony, and reflects a moral culpability greater than reckless indifference. I would hold that Article I, Section 16 requires proof of at least this standard.

At the third stage of the process, sentences of death, based upon sufficient proof as discussed above, are then subject to a case-specific proportionality analysis in which this Court reviews evidence of the defendant's participation in the homicide and his *mens rea* in regard to the homicidal act. *Lockett v. Ohio*, 438 U.S. 621, 98 S. Ct. 2954, 2969-71 (1978), (Blackmun, J., dissenting). The review focuses on the defendant's character and the circumstances of the crime and thus accomplishes the statutory mandate that this Court determine whether the sentence of death imposed in each case "is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." T.C.A. § 39-13-206(c)(1)(D). In accomplishing the comparative proportionality review, the Court makes three inquiries: (1) whether the punishment for the crime conforms with contemporary standards of decency, (2) whether the punishment is grossly disproportionate to the offense, and (3) whether the imposition of the death penalty accomplishes any legitimate penological objective. *State v. Black*, 815 S.W.2d 166 (Tenn. 1991).

The majority Opinion, despite having found that the constitution requires genuine narrowing of the class of death-eligible defendants and, further, that narrowing may not occur at the sentencing stage, nevertheless states, "We, therefore, reaffirm the rejection of a *per se* proportionality approach in favor of the required statutory proportionality review." Main Opinion at ___. The effect of this decision is that prosecutors may indict and juries may convict on proof of reckless indifference, leaving the constitutional requirement for narrowing to appellate review. Both the majority Opinion and Justice Drowota's dissent agree that the only constitutional safeguard is review by this Court. Main Opinion at ___; Drowota, J., dissenting at ___. It is at the appellate review stage that the process in Tennessee is the most deficient.

The Court is required to perform two distinct functions, in addition to the consideration of the assignments of error. It must determine, upon consideration of the evidence regarding aggravating and mitigating circumstances, whether the proof supports the sentence of death; and it must determine, upon consideration of the nature of the crime and the defendant, whether the sentence is excessive or disproportionate in comparison with the penalty imposed in similar cases. T.C.A. § 39-13-206(c)(1)(A)(B)(C)(D). Essential to the performance of the first function is the determination of the quantum of proof required by the constitution or the statute to impose the death penalty. As previously discussed, the majority Opinion concludes, erroneously in my view, that proof of reckless indifference is sufficient.

Performance of the second function, comparative proportionality review, requires a determination different

from that of ascertaining the parameters of the death-eligible class. It requires a consideration not only of the case before the Court but the spectrum of sentences in similar cases throughout the state. *See State v. Harris*, ___ S.W.2d ___ (Tenn. 1992), Reid, C.J., dissenting. Unfortunately, the reported decisions do not reflect strict performance of this function because they do not include a disciplined proportionality review. What passes for a comparative proportionality review is essentially a reiteration of the facts surrounding the commission of the offense, followed by a conclusory statement that the death penalty is not disproportionate in that particular case. Only rarely has the Court even reviewed the facts of other cases in which the death penalty has been affirmed. *See e.g., State v. Barber*, 753 S.W.2d 659 (Tenn. 1988).

The only way to judge the effectiveness of the death penalty process is to examine the results. If it "includes defendants who are not necessarily more deserving of the death penalty and excludes those who are not necessarily less deserving," the process fails to genuinely narrow the class of death-eligible defendants. Rosen, *Felony Murder and the Eight* [sic] *Amendment Jurisprudence of Death*, 31 B.C.L. Review 1103, 1125 (1990). This determination can be made only by comparing murderers sentenced to death with those given less severe sentences, a procedure not followed in past reported decisions. The Court obviously has substituted for the proportionality review required at this third stage of the proceedings a finding that the proof shows the defendant to be a member of the death-eligible group which, under the federal constitution and the Tennessee statute, includes all cases in which the proof meets the threshold standard of reckless indifference. This practice is acknowledged by the statement

in Justice Drowota's dissent that the death penalty is not disproportionate punishment so long as the reckless indifference standard of *Enmund* and *Tison* is met. Drowota, J., dissenting at ___. Consequently, the Court has not found the punishment disproportionate in *any* of the 84 cases in which the sentence of death has been imposed since 1977. This fact alone would suggest there has been no effective proportionality review on appeal. It also places in doubt Justice Drowota's confident assertion that, "Our sentencing system, created to meet the mandates of *Furman* may be trusted to discern and remove those persons perpetrating these less egregious forms of felony murder from the list of those condemned to death." Drowota, J., dissenting at ___.

The result is that the class of death-eligible defendants is not genuinely narrowed by the statutory definition of felony murder; the sentencing statute by its terms fails to narrow the class; Article I, Section 16, as interpreted by the majority in this decision, does not invalidate those provisions of the statute which do not effect narrowing; and the appellate review mandated by statute has been limited to a finding that the proof meets the threshold standard of reckless indifference.

I concur that the judgment of conviction be affirmed and that the case be remanded for sentencing.

I am authorized to state that Justice Daughtrey concurs in this Opinion.

/s/ Lyle Reid
Lyle Reid, C.J.

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE, Appellee, V. JONATHAN VAUGHN EVANS, Defendant-Appellant.	FOR PUBLICATION Filed September 14, 1992 HAMBLEN CRIMINAL Hon. James E. Beckner, Jr., Judge. S.C. No. 36

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OPINION

CONVICTION AFFIRMED.

SENTENCE REVERSED AND REMANDED FOR RESENTENCING

(DROWOTA AND O'BRIEN, JJ., DISSENTING).

DROWOTA, J.

The Defendant, Jonathan Vaughn Evans, appeals his conviction of first-degree felony murder of Mary Slover and the sentence of death. On appeal he challenges the sufficiency of the evidence used to convict him, numerous alleged errors committed by the trial court prior to and during trial, and the constitutionality of the death penalty.

Mary Slover, a grocery store clerk, was murdered on the morning of February 5, 1989, shortly before 8 a.m. during a robbery at a By-Lo Market in Morristown. The Defendant Evans, having worked at the By-Lo from January through July of 1988, knew the victim and also knew the combination to the safe.

The Defendant's presence at the By-Lo Market near the time of the murder was clearly established. Both he and his car were observed in the By-Lo parking lot between 7:50 and 7:55 a.m. Shortly before 8 a.m., a witness saw the Defendant driving at a high rate of speed away from the By-Lo area. Mary Slover was found dead by customers at approximately 8:10 a.m., lying face-up in a back aisle of the store, next to the safe, with her head in a pool of blood. The autopsy revealed a single gunshot wound in the back of her head fired from a .25 caliber automatic pistol.

Later that day a blue bank bag and telephone receiver, taken from the market, and a .25 caliber pistol were seen in the Defendant's car. A month earlier, a gun belonging to the Defendant's landlady was reported missing; about this time, the Defendant gave his girlfriend a similar gun. Ballistic examinations revealed that the bullet removed from Mary Slover's head was fired

from the landlady's missing gun. The Defendant was seen with a large amount of cash after the market robbery and murder.

Based upon the above evidence, the jury convicted Evans of the first-degree felony murder of Mary Slover. We have carefully considered all of the Defendant's contentions as to the guilt phase and find no error. At the sentencing phase the jury found that Evans committed the murder both while engaged in the robbery and in an effort to avoid arrest.[1] The jury determined that the aggravating circumstances outweighed any mitigating circumstances offered in Evans's defense and sentenced the Defendant to death.

In our most recent capital case dealing with aggravating circumstance (i)(7), *State v. Middlebrooks*, ___ S.W.2d ___ (Tenn. 1992), a majority of this Court held that use of the aggravating circumstance in T.C.A. 39-2-203(i)(7) to impose a sentence of death in cases of felony murder

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[1] The jury found two aggravating circumstances:

> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
>
> (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb . . . .

T.C.A. §§39-2-203(i)(6) and (7) (1982), now T.C.A. §§39-13-204(i)(6) and (7) (1991).

violates the Eighth Amendment to the United States Constitution and Article I, Section 16, of the Tennessee Constitution. The same majority today reverses the sentence of death and remands this case for a re-sentencing hearing. The State will be free to re-seek the death penalty if it so desires. Justice O'Brien and I dissent from this holding for reasons found in my dissenting opinion in *Middlebrooks*.

I.

SUFFICIENCY OF THE CONVICTING EVIDENCE

The Defendant contends that the State of Tennessee failed to carry its burden of proving guilt beyond a reasonable doubt, that the evidence is not sufficient to support the jury's verdict, and that the evidence actually preponderates in favor of his innocence. The Defendant submits that, while the State was able to show that the deceased, Mary Slover, was killed during the course of a robbery, it failed to prove beyond a reasonable doubt that he committed the crime.

Because the sufficiency of the evidence is challenged, we shall set out the surrounding facts and circumstances of the crime in greater detail. Evans worked the night shift at Flowers Baking Company in Morristown. Upon reporting to work on Saturday evening, February 4, 1989, he asked his supervisor for permission to leave work thirty minutes early the next morning in order to attend his sister's baptism. On Sunday morning, February 5, 1989, the Defendant left work at 7:30, fifteen minutes early. At approximately 7:35, when Cindy Johnson delivered papers to the By-Lo Market, there were no cars or

individuals present. Still on her route, Ms. Johnson returned to the area about 7:45 and observed a two-toned automobile with tinted windows approach her and drive in the direction of the By-Lo Market. Tina Cloud, who lives near the market, went to get her paper between 7:50 and 7:55. At that time, she observed Evans's car, a two-toned brown car with tinted windows, parked in the By-Lo parking lot. The driver's side window was approximately three-quarters of the way down, and she was able to identify Evans inside the car. At approximately the same time, George Simpson also saw the Defendant's car parked in the By-Lo parking lot and recognized Mary Slover standing in the doorway of the market. Other evidence adduced at trial indicated that Ms. Slover clocked in at 7:42 a.m. When Mr. Simpson left the parking lot a few minutes before 8:00, the Defendant's car was still parked at the market. Around 8:00 another witness, Eugene Ellis, saw a car with tinted windows and a black "car bra" across the front grill driving away from the By-Lo area at a high rate of speed. By the time Ellis reached the By-Lo market, only Mary Slover's car was in the parking lot.

Ronnie Helton arrived at the By-Lo Market between 8:05 and 8:10 a.m. He noticed that the keys to the market were still in the lock on the inside of the door. He selected something to drink and waited at the cash register. While he was waiting, Mary Thomas arrived at the market to purchase gas. Gary Hannah also arrived to get coffee. When no one came to wait on them, Helton and Hannah looked throughout the market for a clerk. Helton saw the body of Mary Slover lying on the floor next to the open safe, with her head in a pool of blood. Police and an

ambulance were summoned. When the police arrived at approximately 8:21 a.m., the market was in disarray. The cash register was open and empty, the safe was open and empty, and the telephone receiver and cord were missing. When paramedics arrived at approximately 8:25 a.m., the victim had no pulse or respiration.

The police investigation revealed that two blue zippered First Tennessee Bank bags were missing and approximately $1,300 was stolen, including $800-$900 in $20 bills and $130 in coins. The investigation further disclosed that the Defendant did, in fact, drive a two-toned brown automobile with tinted windows. A search of his vehicle yielded a black "car bra" from the trunk.

Doctor Sung J. Chung, a pathologist and Director of the Department of Pathology at Morristown-Hamblen Hospital, testified that the victim died within a very few minutes of a gunshot to the back of the head. A .25 caliber bullet was removed from the victim's brain. Dr. Chung testified that before the fatal gunshot wound was inflicted, Ms. Slover had apparently been struck on the head by a blunt instrument, "suggestive of [an] injury inflicted by a telephone receiver." The area of impact "was suggestive of . . . a moderately heavy blow . . . [a] blow that could have caused unconsciousness."

Testimony by ballistics experts opined that the bullet removed from Mary Slover's brain was fired from the gun that the Defendant's landlady, Shannon Bussell, had reported missing from her home on January 2, 1989, a silver .25 caliber automatic pistol. Evans rented a room from Ms. Bussell in December 1988. Ms. Bussell, a single parent, occupied her home with her five children. Having

reported the missing gun to the police, she asked the Defendant if he had taken it, and he responded, "No." Ms. Bussell, in late 1988, had used her pistol for target shooting in New Market, Tennessee, at the home of John Abbott. Two .25 caliber projectiles were retrieved from the place she stated she had used her pistol for target practice. These projectiles, together with the bullet removed from the victim's brain, were tested. Dr. Michael McCoy and Dr. A. M. Brown at the Walters State Community College crime lab, and Steve Scott at the T.B.I. laboratory examined these bullets and concluded that all three had been fired from the same weapon.

Johnny Bussell, the seven year old son of Ms. Bussell, testified that on the afternoon of the crime, while riding with the Defendant in the Defendant's car, he opened a "speaker box" on the Defendant's back seat and saw his mother's missing handgun. He also noticed a blue zippered bank bag under the driver's seat of Evans's car. When the Defendant opened his trunk to fix a flat tire that same day, Johnny Bussell testified he saw a cracked telephone receiver with an attached cord. Johnny's fifteen year old sister, Tabitha, also saw the telephone receiver and cord in the Defendant's trunk.

On the day of the Slover murder, the Defendant arrived at the home of Ms. Bussell, at approximately 8:05 or 8:10 a.m. He gathered his clothes for church and left around 8:15 a.m. He then went to the home of his girlfriend, Angelica Lee, and showered and dressed for church. Sometime between 8:30 and 9:00 a.m., he called Roderick Ellington, a friend and co-worker, and informed him of the murder of a clerk at the By-Lo Market. This conversation occurred approximately two hours before

Evans was actually told by police officers that Mary Slover was dead. Ellington also testified that he had twice before seen Evans with a silver .25 caliber automatic pistol.

Evans and Ms. Lee left her apartment around 9:15 a.m., went to a restaurant for breakfast, stopped by the bakery to pick up the lunch pail Evans had forgotten, and drove to Kingdom Hall in Jefferson City to attend church. After the church services, Evans and Ms. Lee returned to Morristown and drove by the By-Lo Market. Seeing the commotion at the market, the Defendant stopped and asked Officer Harrison what had happened. The officer testified it was approximately 11:00 a.m. when he informed Evans that Mary Slover had been killed.

On the afternoon of the murder, the Defendant was observed with a roll of twenty and fifty dollar bills. The next day, the Defendant paid $135 in cash for a rifle and $180 in cash to redeem Ms. Lee's jewelry from an area pawn shop. He also made two separate deposits of $200 in cash at different branches of the Merchants & Planters Bank. On the same day, he and Ms. Lee rolled over $100 worth of change in wrappers he had received from Ms. Bussell. He gave Ms. Lee $25 in change to make a payment to a friend for a car. Ms. Bussell testified that Evans told her family that he was being questioned in regard to the Slover murder and that they should refuse to answer police questions about him. Tanya Bussell, age 16, testified that Evans admonished her not to speak with the police about him except to say that he first came to their home on February 5 at 7:45 a.m., rather than shortly after 8 a.m.

The Defendant denied taking Ms. Bussell's .25 caliber pistol and stated that he had never owned a handgun. At trial, Ms. Bussell was asked if she confronted Evans about her missing pistol; she replied that she asked him "if he took it to give to [his girlfriend, Ms. Lee] because [she] was supposed to be having trouble with her husband. And he said, No." Although the Defendant denied having any knowledge of Ms. Bussell's missing pistol, at trial his girlfriend, Ms. Lee, testified that the Defendant had purchased a silver .25 caliber automatic pistol and had given it to her. Ms. Lee testified that on Tuesday morning, after the murder, the Defendant telephoned her and asked her "to go in the kitchen and take the pistol that was in the kitchen and put it up somewhere." She stated: "He said something to the effect that the police had been there and questioned him or talked to him and if they came over there that it wouldn't look good for it to be there." Ms. Lee followed Defendant's instructions and hid the pistol. The next day, Wednesday, February 8, Evans removed the weapon from Ms. Lee's home and disposed of it.

In his statement, Evans stated that he left work at approximately 7:50 a.m. As he was going to Shanon Bussell's home to pick up his clothes, he realized that he had left his lunch pail at work, so he pulled into the By-Lo parking lot to turn around. He saw Pete Cloud's daughter going to the mail box to get the paper. He also saw someone delivering papers in a white Chevette. He then realized that because it was ten minutes till eight, he did not have time to get his lunch pail, so he went to Ms. Bussell's house around 8 a.m., got his clothes, and went to his girlfriend's house to take a shower before church.

Based upon the above proof, the Defendant was convicted of first degree murder. At a separate sentencing hearing, the State incorporated by reference the evidence offered during the guilt phase of the proceeding. The Defendant took the stand, denied any involvement in the murder, and asked the jury to sentence him to life imprisonment. Similarly, relatives and friends of Evans testified as to his good character and the value of his life to the community. After deliberating, the jury found aggravating circumstances and determined that the aggravating circumstances outweighed the mitigating circumstances offered by Evans. The Defendant was sentenced by the jury to death by electrocution.

When the sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *see* Tenn. R. App. P. (13(e). A jury verdict approved by the trial judge credits the testimony of the witnesses for the State and resolves all conflict in favor of the State's theory. *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983), *cert. denied*, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed.2d 753 (1984); *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). A verdict against the Defendant removes the presumption of innocence and raises a presumption of guilt on appeal, *State v. Grace*, 493 S.W.2d 474, 476 (Tenn.

1973), which the Defendant has the burden of overcoming. *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977).

In determining the sufficiency of the evidence, this Court is not permitted to re-weigh or re-evaluate the evidence. *State v. Cabbage, supra*, 571 S.W.2d at 836. Nor may this Court substitute its inferences for those drawn from the evidence by the trier of fact. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The Defendant argues that he was convicted solely on circumstantial evidence and that the State did not introduce any direct evidence to connect him with this offense. However, a conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985), *cert. denied*, 475 U.S. 1031, 106 S. Ct. 1240, 89 L. Ed2d 348 (1986); *State v. Williams*, 657 S.W.2d 405 (Tenn. 1983), *cert. denied*, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed.2d 753 (1984); *State v. Crawford*, 225 Tenn. 478, 484, 470 S.W.2d 610, 612 (1971). The testimony credited by the jury in this case clearly establishes the Defendant's presence near the By-Low Market at the approximate time of the murder. Although the Defendant correctly asserts that mere presence at the scene of the crime is not sufficient to prove guilt beyond a reasonable doubt, other evidence adduced at trial, and cited at length above, clearly connects Evans to the murder of Mary Slover and is sufficient to support any rational trier of fact in finding the Defendant guilty of first degree murder beyond a reasonable doubt. Tenn. R. App. P. 13(e). The Defendant's challenge to the sufficiency of the evidence is without merit.

In a related issue, the Defendant avers that the trial court erred in overruling his motion for acquittal at the conclusion of the State's proof. The Defendant argues that when the evidence is insufficient as a matter of law, the trial court must direct a verdict of acquittal. However, since we hold there is sufficient evidence to support a verdict of guilty, the trial court did not err in overruling the Defendant's motion for judgment of acquittal. *See Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978).

II.

ALLEGED PRETRIAL ISSUES

A. Change of Venue

The Defendant contends that the trial court erred in denying his motion for a change of venue. He avers that murder is an atrocious and heinous crime wherever committed, but it is made even more so when a black male defendant allegedly kills a white female in a predominately white community. He alleges that to try him in Hamblen County violates his right to a fair trial by an impartial jury, which is guaranteed to the Defendant by the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article I, Sections 8 and 9, of the Constitution of the State of Tennessee.

The decision of whether to change venue rests within the sound discretion of the trial court, and this decision will not be reversed on appeal absent a clear abuse of that discretion. *State v. Melson*, 638 S.W.2d 342, 360 (Tenn. 1982), *cert. denied*, 459 U. S. 1137, 103 S. Ct. 770, 74 L. Ed.2d 983 (1983). The Defendant has not established such

abuse here. The record does not reveal that this case was given extensive media coverage or publicity in Hamblen County. In order to reverse a conviction for improper denial of a motion to change venue, defendant must demonstrate that the jurors who actually sat were biased or prejudiced against him. *State v. Burton*, 751 S.W.2d 440 (Tenn. Crim. App. 1988). Selection of the jury did not reveal extensive prejudice regarding the case. The few prospective jurors who had formed an opinion as to Evans's guilt or innocence were properly excused for cause. Although most of the potential jurors admitted they had heard or read reports of the murder, each actual juror stated unequivocally that he or she had not prejudged the case and would render a verdict based only upon evidence adduced at trial. Because the Defendant has failed to demonstrate that the actual jury was prejudiced, the issue is without merit.

B. Investigator Paid by the State

The Defendant next avers that the trial court erred in denying his motion for an investigator paid by the State as permitted under T.C.A. § 40-14-207(b). Particularly, the Defendant argues that the trial court should have granted his motion for appointment of an investigator to assist defense counsel in interviewing witnesses listed on the State's witness list.

T.C.A. § 40-14-207(b) provides, in part:

> (b) In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an *ex parte* hearing may in its discretion determine

> that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.

This statute provides that it is in the trial court's discretion as to whether investigative services are necessary to protect the constitutional rights of the defendant. *State v. O'Guinn*, 709 S.W.2d 561, 568 (Tenn. 1986), *cert. denied*, 479 U. S. 871, 107 S. Ct. 244, 93 L. Ed.2d 169 (1986).

The courts have uniformly held that the right to assistance of state paid experts exists only upon a showing of a particularized need. The defendant must show that a substantial need exists requiring the assistance of state paid supporting services and that his defense cannot be fully developed without such professional assistance. The Defendant did not request such an investigator until six days before the scheduled start of the trial. Moreover, as conveyed to the trial judge, defense counsel had the names of all potential witnesses at least five weeks before trial, and many of the potential witnesses were listed on the indictment returned six months prior to trial. The trial court ruled:

> Of course I don't want to put any undue hardship on counsel but you have one retained counsel and two appointed counsels . . . with three lawyers and the period of time you should be able to talk to all witnesses. I don't find there's such unusual circumstances are . . . are showing of need for appointment of an investigator. I . . . I certainly in the capital cases especially would appoint any aide or expert that I feel is . . . is needed to give fair representation of the

> defendant. But I don't feel that that's necessary in this case.

The Defendant has made no showing that without the assistance of an investigator he was, in fact, unable to adequately interview potential witnesses. This issue is without merit.

C. Venire Composition

The Defendant challenges the venire composition under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Article I, Sections 8, 9, and 16 of the Tennessee Constitution. He alleges that the trial court erred by failing to verify that blacks were proportionately represented in the jury venire and by failing to grant his motion to dismiss the indictment based upon that alleged underrepresentation.

In order to establish, in the context of jury selection, a *prima facie* case of purposeful discrimination under the Fourteenth Amendment, the Defendant must show that (1) he is a member of an excluded, recognizably distinct class; (2) the class to which the Defendant belongs has been underrepresented on venires for a significant period of time; and (3) the selection procedure is susceptible to abuse. *See Castaneda v. Partida*, 430 U.S. 482, 494, 97 S. Ct. 1272, 1280, 51 L. Ed.2d 498 (1977) (addressing claim of underrepresentation on grand jury). To establish that the venire violates the Sixth Amendment's right to a jury representing a fair cross-section of the community, a defendant must establish that (1) the excluded group is a "distinctive group" in the community; (2) representation of the group in the jury pool is not fair and reasonable in

relation to the number of group members in the community; and (3) underrepresentation of the group is due to systematic exclusion in the jury selection process. *See Duren v. Missouri*, 439 U.S. 357, 364-66, 99 S. Ct. 664, 668-69, 58 L. Ed.2d 579 (1979); *see also State v. Thompson*, 768 S.W.2d 239, 246 (Tenn. 1989), *cert. denied*, 110 S. Ct. 3288 (1990).

The Defendant has failed to establish a *prima facie* case under either the Fourteenth or Sixth Amendment. Evans introduced no evidence concerning the percentage of blacks in Hamblen County, the percentage of blacks on other venires, the potential for abuse of the selection procedure, or the systematic exclusion of blacks in the jury selection process. The record in this case reveals that the jury panel consisted of 77 individuals, four of whom (5.19 percent) were black. Because blacks constitute only 4.77 percent of the total Hamblem [sic] County population, the venire actually had a greater representation of black citizens than the county as a whole. Even though none of the four black members of the venire were selected to sit on the Defendant's jury, such a fact does not establish a constitutional violation in this case. Both defense counsel and the prosecution admitted during the hearing on Evans's motion for a new trial that all four black potential jurors were excused by the court either because they could not consider imposition of the death penalty or because they would never convict solely on circumstantial evidence.

The percentage of blacks on the venire in this case exceeded the percentage of blacks in the Hamblem [sic] County population. Moreover, none of the black individuals on the venire were removed from the panel by the

prosecution. Rather, all four were properly excused for cause by the court. Given these facts and the failure of the Defendant to otherwise establish a *prima facie* violation of either the state or federal constitution in the selection process, the trial court did not err in failing to verify that blacks were proportionately represented on the venire. Furthermore, the trial court did not err in denying Evans's motion to dismiss the indictment based upon the racial composition of the jury.

III.

ALLEGED ERRORS AT TRIAL

A. Photographs

The Defendant next contends that the trial court erred in overruling his motion to suppress certain photographs. He avers that the photographs were highly prejudicial and inflammatory, thereby depriving him of his fundamental constitutional rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 8, 9, and 16, of the Tennessee Constitution.

Generally, "the admissibility of photographs is a matter to be determined by the trial court in the exercise of its sound discretion." *Cagle v. State*, 507 S.W.2d 121, 132 (Tenn. Crim. App. 1973). The trial court's ruling will not be overturned on appeal except upon a clear showing of abuse of that discretion. *State v. Harbison*, 704 S.W.2d 314, 317 (Tenn. 1986); *State v. Banks*, 564 S.W.2d 947, 949 (Tenn.

1978). If the probative value of any photograph outweighs its prejudicial effects, the photograph is admissible. *See Banks*, 564 S.W.2d at 951.

In the present case, the photographs of the victim were in black and white and were not gruesome or inflammatory. Moreover, these photographs were relevant to show the body's position and location within the market and the proximity of the body to the market's safe.

In *State v. Banks, supra*, this Court approved Federal Rules of Evidence 401 and 403 to be followed by our courts as a proper guide in both criminal and civil cases. Effective January 1, 1990, this Court adopted the Tennessee Rules of Evidence, which trace Federal Rules 401 and 403 verbatim. Rule 401 defines relevant evidence as that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 403 provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *State v. Bates*, 804 S.W.2d 868, 878-79 (Tenn. 1991).

We find that the probative value of the photographs is not substantially outweighed by unfair prejudice as required for exclusion under Tennessee Rule of Evidence 403, and, therefore, that the trial court did not abuse its discretion in allowing their admission. Additionally, it does not affirmatively appear that the "admission of the

photographs has affected the results of the trial." Tenn. R. Crim. P. 52; *see also, United States v. Brady*, 595 F.2d 359, 361 (6th Cir. (construing Fed. R. Evid. 403), *cert. denied*, 444 U. S. 862, 100 S. Ct. 129, 62 L. Ed.2d 84 (1979).

B. Testimony of Johnny Bussell

The Defendant contends that the trial court erred in admitting into evidence the testimony of seven-year-old Johnny Bussell. Evans contends that the child did not appreciate the sanctity of the oath and the necessity to testify truthfully.

When a witness is under the age of 14 years, a rebuttable presumption arises that the child is not competent to testify. *State v. Francis*, 669 S.W.2d 85, 90 (Tenn. 1984); *State v. Fears*, 659 S.W.2d 370, 375 (Tenn. Crim. App. 1983), *cert. denied*, 465 U. S. 1082, 104 S. Ct. 1450, 79 L. Ed.2d 768 (1984). The presumption may be rebutted, however, by evidence "that the witness possesses the requisite testimonial capacities and understands the nature and obligation of the oath." *Francis*, 669 S.W.2d at 90.

The determination of the competency of witnesses to testify is vested in the trial court's discretion. *State v. Robinson*, 618 S.W.2d 754, 756 (Tenn. Crim. App. 1981); *State v. Nelson*, 603 S.W.2d 158, 168 (Tenn. Crim. App. 1980). In this case, the trial court questioned Johnny Bussell prior to his testimony to determine whether he understood the necessity to tell the truth under oath. From the results of the questioning, the trial judge determined that Johnny Bussell understood both the nature and obligation of the oath. We conclude that the witness

demonstrated that he was competent to testify; it follows that the trial court did not abuse its discretion in denying the Defendant's motion to prohibit his testimony.

C. Reprimand of Defendant

The Defendant next alleges that the trial court erred in reprimanding him during the sentencing hearing. During the sentencing hearing, the following colloquy took place between the Defendant, Defendant's counsel, and the trial judge:

> DEFENDANT'S COUNSEL: "Mr. Evans, do you have . . . do you have anything that you would like to say to this jury?"
>
> DEFENDANT: "The only thing I can say and say in all honesty is that I did not kill Mary Slover. I had nothing to do with it but you have decided. *That's something I guess now you'll have to live with.* . . . "
>
> THE COURT: " . . . I'll say one thing. I won't permit any criticism of the jury. Say anything you want to say but I won't permit any criticism of the jury."

[Emphasis added.]

The trial court may have concluded that Defendant's comment impugning the jury verdict was improper and also that criticism of the jury was not in Defendant's best interest. The Defendant's life was in the hands of the jury; further remarks criticizing the jury could have been damaging to Defendant's case. We find no error committed by the trial court by insuring that such comments were not repeated.

D. Interruption of Closing Argument

The Defendant next avers that the trial court erred in twice interrupting defense counsel's closing argument. The trial commenced at 9:00 a.m. The trial judge interrupted counsel's argument between 10:30 and 10:45 in order to take a ten minute recess and later interrupted counsel again to ask how much longer his argument would take. The court had earlier ruled that since this was a capital case, there would be no limitation on closing argument. The Defendant argued for one hour and 20 minutes. It is the duty of all trial judges to see that the proceedings before them move along in an orderly and systematical manner. The law is well settled that the trial judge has discretion in the conduct of a trial. *Pique v. State*, 480 S.W.2d 546, 550 (Tenn. Crim. App. 1971). The interruption of lengthy closing arguments to take a short recess or bathroom break will not, without evidence to the contrary, prejudice a defendant's case. Moreover, the Defendant made no objection to the recess being taken at that time.

During oral argument before this Court, the Chief Justice asked counsel for Defendant whether these two incidents were the only occasions when the court arguably indicated any lack of patience with defense counsel or the Defendant. Counsel responded by stating that this was a six-day trial and these were the only two incidents. Counsel further stated: "There were certain motions or judgments that were rendered by the court that when they were borderline I felt that he did give in . . . let the scales weigh heavier for Defendant and rule in his favor." Counsel in Defendant's brief states that "it is essential that a criminal trial be managed fairly and that trial

judges shall not only be just to both sides, but that they observe in their judicial demeanor an even tenor, so that an impartial state of mind shall be apparent to all concerned." We agree with counsel's statement, and our reading of this record shows that the trial was conducted in an even-handed manner. Moreover, counsel's comment during oral argument before this Court indicates that the trial judge reflected an impartial state of mind apparent to all concerned. We find this issue to be without merit.

E. Alleged Prosecutorial Misconduct

The Defendant next avers that the State committed prosecutorial misconduct by failing to disclose mitigating information discovered during their investigation. Counsel for Defendant, during oral argument, stated that during a trial recess when the jury was out deliberating, counsel talked to one of the investigating police officers, who mentioned that Defendant might have been locked in a woodshed as a child. It is alleged that this evidence of child abuse was withheld by the State. Counsel also stated during oral argument that he was unaware that this information was in the State's file. At the hearing on Defendant's motion for a new trial, the Assistant District Attorney stated that he was familiar with the State's file and had not learned until that day that the Defendant was contending he was abused as a child. The record indicates that the State gave Defendant's counsel open access to its file and that Defendant's counsel had ample opportunity to talk with the detectives in this case. The State argues that the Defendant himself certainly had knowledge of his own childhood and thus was in actual

possession of the allegedly mitigating evidence. However, counsel for Defendant stated that when he asked Evans about this, Evans denied ever being locked up in a woodshed as a child.

In order to prove a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), the Defendant must establish that the prosecutor suppressed discoverable information, that such information was of a favorable character for the defense, and that the suppressed information was material. *Strouth v. State*, 755 S.W.2d 819 (Tenn. Crim. App. 1986). We find no evidence in this record to support a *Brady* violation. The record fails to reflect that the State suppressed child abuse information from the Defendant. Having found no prosecutorial misconduct, this issue has no merit.

IV.

CONSTITUTIONALITY OF THE DEATH PENALTY

Defendant concludes by stating that imposition of death is cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article I, Section 16 of the Tennessee Constitution, that the trial court erred in overruling his motion to dismiss the indictment on the grounds that the death penalty is unconstitutional; that death by electrocution is cruel and unusual punishment; and that the State's reluctance to carry out the penalty and the finality and severity of the punishment constitute cruel and unusual punishment. The Defendant further contends that the death penalty should be abolished. These issues were discussed at length in the majority and dissenting opinions in *State v.*

Black, ___ S.W.2d ___ (Tenn. 1991). There, a majority of this Court upheld the constitutionality of the Tennessee Death Penalty Statute.

The Defendant further contends that the death penalty is arbitrarily and capriciously applied in Tennessee and that he was discriminated against because of his race and, thus, was denied due process. In order to establish that the discriminatory application of the death penalty violates the Equal Protection Clause, a defendant must show that the legislature enacting the statute, or the jury sentencing the defendant, acted with a discriminatory intent. *State v. Irick*, 762 S.W.2d 121, 129 (Tenn. 1988), *cert. denied*, 489 U.S. 1072, 109 S. Ct. 1357, 103 L. Ed.2d 825 (1989); *State v. Porterfield*, 746 S.W.2d 441, 451-52 (Tenn. 1988), *cert. denied*, 486 U.S. 1017, 108 S. Ct. 1756, 100 L. Ed.2d 218 (1988); *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed.2d 262 (1987). The record does not support the Defendant's contention that the jury discriminated against him when they imposed the death penalty. Nor does the record indicate that the Tennessee Legislature acted with a discriminatory purpose when it enacted the Death Penalty Statute.

V.

CONCLUSION

A.

All members of this Court find no error in the guilt phase of this case and we affirm the conviction of felony murder.

B.

Three members of this Court find that the death penalty may constitutionally be imposed upon conviction under the felony-murder statute, T.C.A. § 39-2-202(a) (1982). *See State v. Middlebrooks*, ___ S.W.2d ___ (1992) (Chief Justice Reid and Justice Daughtrey dissenting).

C.

Three members of this Court hold that the aggravating circumstance set forth in T.C.A. 39-2-203(i)(7) (1982), that the Defendant was engaged in committing a felony, essentially duplicates the elements of the offense of first-degree murder set out in T.C.A. § 39-2-202(a) (1982). *See State v. Middlebrooks, supra* (Justices Drowota and O'Brien dissenting).

The judgment of conviction is affirmed, the sentence of death is reversed and set aside and this cause is remanded to the trial court for further appropriate proceedings. As author of this opinion, I disagree with the results reached insofar as sentencing is concerned and continue to adhere to the views expressed in my dissenting opinion in *State v. Middlebrooks, supra*. I would affirm the judgment both as to the Defendant's guilt and his sentence of death and am authorized to state that Justice O'Brien would do the same. Costs incident to this appeal are adjudged against the Appellee.

/s/ Frank F. Drowota, III
FRANK F. DROWOTA, III
JUSTICE

Concur:

Reid, C.J.
Daughtrey and Anderson, JJ.

Dissent from Sentencing:

Drowota and O'Brien, JJ.

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No. 92-989

IN THE UNITED STATES SUPREME COURT
October Term 1992

STATE OF TENNESSEE,

Petitioner,

v.

DONALD RAY MIDDLEBROOKS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Tennessee

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether this Court lacks jurisdiction to review State v. Middlebrooks, ___ S.W.2d ___, No. 01-S-01-9102-CR-00008, slip op. at 51-67 (Petitioner's Appendix A at A48-A64) (Tenn. September 8, 1992), because the Tennessee Supreme Court alternatively based that decision on Article I, Section 16 of the Tennessee Constitution

B. Assuming that this Court has jurisdiction to review State v. Middlebrooks, ___ S.W.2d ___, No. 01-S-01-9102-CR-00008, slip op. at 51-67 (Petitioner's Appendix A at A48-A64) (Tenn. September 8, 1992), whether that decision conflicts with decisions of this Court or of any United States Circuit Court

II. TABLE OF CONTENTS

I. QUESTIONS PRESENTED FOR REVIEW i

II. TABLE OF CONTENTS ii

III. TABLE OF AUTHORITIES iv

IV. OPINIONS AND JUDGMENTS DELIVERED IN COURT BELOW . 1

V. STATEMENT OF JURISDICTION 1

VI. CONSTITUTIONAL PROVISIONS INVOLVED 1

VII. STATEMENT OF THE CASE 2

VIII. SUMMARY OF THE ARGUMENT 7

A. THIS COURT LACKS JURISDICTION TO REVIEW THE MIDDLEBROOKS DECISION BECAUSE IT IS ALTERNATIVELY BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION. . 7

B. ASSUMING THAT THIS COURT HAS JURISDICTION TO REVIEW MIDDLEBROOKS, THAT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF ANY UNITED STATES CIRCUIT COURT 8

IX. ARGUMENT 10

A. THIS COURT LACKS JURISDICTION TO REVIEW MIDDLEBROOKS BECAUSE THAT DECISION IS ALTERNATIVELY BASED ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION. . 10

1. MIDDLEBROOKS CONTAINS PLAIN STATEMENTS THAT THE TENNESSEE SUPREME COURT ALTERNATIVELY BASED THAT DECISION ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION. 11

2. EVEN SHOULD THIS COURT CONCLUDE THAT THE TWO PLAIN STATEMENTS IN MIDDLEBROOKS DO NOT IN AND OF THEMSELVES DEPRIVE THIS COURT OF JURISDICTION, A REVIEW OF THE MIDDLEBROOKS OPINION CONFIRMS THE PLAIN STATEMENTS THAT THE TENNESSEE SUPREME COURT ALTERNATIVELY BASED ITS DECISION ON ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION 14

a. MIDDLEBROOKS REPEATEDLY MENTIONS THE TENNESSEE CONSTITUTION 15

b. MIDDLEBROOKS RELIES ON A STATE COURT CASE APPARENTLY INTERPRETING THAT STATE'S CONSTITUTION, THE CONSTITUTION AFTER WHICH TENNESSEE PATTERNED IT'S CONSTITUTION 16

c. MIDDLEBROOKS CONSIDERS STATE LEGISLATIVE ACTION IN CONJUNCTION WITH A PLAIN STATEMENT 17

3. CONCLUSION. 20

B. ASSUMING THAT THIS COURT HAS JURISDICTION TO REVIEW MIDDLEBROOKS, THAT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF ANY UNITED STATES CIRCUIT COURT 20

X. CONCLUSION 24

III. TABLE OF AUTHORITIES

A. CONSTITUTIONAL PROVISIONS

Article I, Section 16 of the Tennessee Constitution . . . . . .passim

Preamble and Declaration of Rights, Constitution of the State of Tennessee. 16

Eighth Amendment to the federal constitution .passim

B. STATUTES

Tenn. Code Ann. sec 39-2-202 (a) 22

28 U.S.C. sec 1257 (a) 10

C. CASES

Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989). 23

Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988). 21-22

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). 13

Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, ___ L.Ed.2d ___ (1991) 11

Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), overruled, Perry v. Lockhart, 871 F.2d 1384, 1393 (8th Cir. 1989). 15

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). 23-24

Erzonznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) 21

Fleming v. Zant, 386 S.E.2d 339, 341-42 (Ga. 1989). 18-19

Florida v. Riley, ___ U.S. ___, 109 S.Ct. 693, ___ L.Ed.2d ___ (1989) 13

Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). 21

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). 21

Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, ___ L.Ed.2d ___ (1989) 11, 13

Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed.2d 789 (1945) 10

Illinois v. Rodriguez, ___ U.S. ___, 110 S.Ct. ___ L.Ed.2d ___ (1990). 11, 12

Lowenfield v. Phelps, 484 U.S. 321, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) 15,21

Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988) 13

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 11

New York v. Class, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986) 14

New York v. P.J. Video, Inc., 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986). 13

Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) 13

Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). 13

Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2935, ___ L.Ed.2d ___ (1989) 18-19

Perry v. Lockhart, 871 F.2d 1384, 1392-1393 (8th Cir. 1989). 22

Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) 20-21

State v. Cherry, 257 S.E.2d 551 (N.C. 1979) . .16-17

State v. Smith, 755 S.W.2d 757, 768 (Tenn. 1988). 15

Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). 23-24

Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) 18

Uhler v. American Federation of Labor - Congress of Industrial Organizations, 468 U.S. 1310, 105 S.Ct. 5, 82 L.Ed.2d 896 (1984) 16, 17

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) 22

D. OTHER AUTHORITY

Laska, A Legal and Constitutional History of Tennessee, 1772-1972, 6 Memphis State University Law Review 563, 582 (1976). 16

IV. OPINIONS AND JUDGMENTS DELIVERED IN COURT BELOW

Petitioner seeks review of State v. Middlebrooks, ___ S.W.2d ___, No. 01-S-01-9102-CR-00008, slip op. at 51-67 (Petitioner's Appendix A at A48-A64) (Tenn. September 8, 1992), and State v. Evans, ___ S.W.2d ___, No. 36, slip op. at 27 (Petitioner's Appendix A at A111) (Tenn. September 14, 1992).[1]

V. STATEMENT OF JURISDICTION

Respondent contests petitioner's assertion that this Court has jurisdiction over petitioner's petition under 28 U.S.C. sec. 1257 (a).

VI. CONSTITUTION PROVISIONS INVOLVED

A. Article I, Section 16 of the Constitution of the State of Tennessee which provides

> That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

B. Eighth Amendment to the United States Constitution which provides

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[1] Evans summarily applies the Middlebrooks decision without discussion.

VII. STATEMENT OF THE CASE

The September 1987 Davidson County, Tennessee, Grand Jury indicted respondent Donald Ray Middlebrooks on four criminal counts for events occurring on or around April 26, 1987. The first count charged respondent with first-degree murder alleging, alternatively, that 1) respondent with premeditation deliberately murdered Kerrick Majors; and 2) respondent murdered Majors in the perpetration of a felony, that felony being either kidnapping or larceny.[2] The second count charged respondent with aggravated kidnapping in violation of Tenn. Code Ann. sec. 39-2-301 (1982); the third count charged respondent with armed robbery; and the fourth count charged respondent with aggravated sexual assault in violation of Tenn. Code Ann. 39-2-606 (1982). T.R. 3-7.[3] The State informed respondent that should a jury convict him of first-degree murder, it would seek the death penalty based upon two aggravating circumstances: 1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of

[2] The statute under which the Davidson County Grand Jury charged respondent with first-degree murder defined such murder as

> murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any ... larceny (or) kidnapping.

Tenn. Code Ann. sec. 39-2-202 (a) (1982). Section 39-2-201, Tenn. Code Ann. (1982) described murder as the killing of a reasonable creature in being, with malice aforethought, either express or implied, by a person of sound memory and discretion.

[3] Respondent shall cite the technical record to his trial "T.R. (page)." Respondent shall cite the transcript to his trial "R. (volume), (page)."

mind, Tenn. Code Ann. sec. 39-2-203 (i)(5) (1982); and 2) the murder was committed while the respondent was engaged in committing a felony, Tenn. Code Ann. sec. 39-2-203 (i)(7). T.R. 12-13.

At the conclusion of the trial to determine respondent's guilt or innocence, the jury found respondent 1) guilty of first-degree murder, specifically finding that respondent murdered the victim during the perpetration of a felony, that felony being kidnapping; 2) guilty of aggravated kidnapping; 3) not guilty of armed robbery; and 4) not guilty of aggravated sexual assault. T.R. 86. Pursuant to Tenn. Code Ann. sec. 39-2-203 (a), the trial moved on to the sentencing hearing for the first-degree murder conviction at which the jury would determine whether respondent would receive a life sentence or the death penalty for that conviction.

At the sentencing hearing, the State introduced photographs of the victim in support of its contention that the murder for which the jury convicted respondent was especially heinous, atrocious, or cruel. Respondent introduced his mitigating evidence, and the hearing proceeded to closing arguments. At closing, the State argued in support of the felony-murder aggravating circumstance that

> (A)ll the evidence that was in the trial also became a part of this hearing. The State's not required to go through again and prove to you that Kerrick Majors was killed during the time that he was kidnapped. You heard all of that. You know all of that, that the child was taken, he was drug away, that he was concealed, that he was tortured and that he was ultimately killed. There's no doubt about that ...."

R. 15, 2138. After closing arguments the jury retired and, upon

returning, announced that it sentenced respondent to death for the murder of Kerrick Majors based on 1) its finding that respondent committed the murder during the perpetration of a felony; 2) its finding that the murder was especially heinous, atrocious, or cruel; and 3) its finding that mitigating circumstances did not outweigh the aggravating circumstances found. See Tenn. Code Ann. sec. 39-2-203 (f) (1982).

Respondent appealed his conviction and sentence to the Tennessee Supreme Court. That court addressed the issues raised by respondent, concluding that they did not merit reversal of respondent's conviction or sentence. After doing so, the Tennessee Supreme Court addressed issues not directly raised by the parties: 1) whether Tennessee may constitutionally impose the death penalty for felony-murder under Tennessee's death penalty statute; and 2) whether the felony-murder aggravating circumstance applied in respondent's sentencing hearing sufficiently narrowed the population of death-eligible murder defendants. See Middlebrooks, ___ S.W.2d at ___, slip op. at 2-4 (petitioner's Appendix A at A2-4).

After finding the death penalty for felony-murder constitutional under the federal and state constitutions, the Tennessee Supreme Court considered whether applying the felony-murder aggravating circumstance at a first-degree murder sentencing hearing upon a conviction for felony-murder presented a constitutional violation. The court stated the issue as whether the felony-murder aggravating circumstance fails to narrow the

population of death-eligible defendants because it duplicates the elements of felony-murder. Middlebrooks, ___ S.W.2d at ___, slip op. at 51-52 (petitioner's Appendix A at A48). The court recognized that its previous decisions had found such duplication constitutional, and then made the following plain statement.

> Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, see Tenn. Code Ann. sec. 40-35-111 (1982) and 40-35-114 (1990), and we are of the opinion that Article I, section 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well.

Middlebrooks, ___ S.W.2d at ___, slip op. at 53 (petitioner's Appendix A at A49-A50).

After discussing a state case accepting this duplication challenge, State v. Cherry, 257 S.E.2d 551 (1979), the court went on to discuss Eighth Amendment procedural prerequisites for imposition of the death penalty upon one found guilty of murder. It concluded that a capital sentencing regime must narrow the class of those persons found guilty of murder to a smaller, more culpable, class of convicted murderers. Middlebrooks, ___ S.W.2d at ___, slip op. at 54-59 (petitioner's Appendix A at A51-A56). The court noted that states may comply with this federal constitutional requirement by narrowly defining capital murder or by the use of aggravating circumstances at a sentencing hearing. Construing the Tennessee death penalty statute, the court concluded that because that statute provides a broad definition for first-degree murder, the "narrowing" required by the Eighth Amendment must occur in the application of aggravating circumstances at the sentencing hearing. Middlebrooks, ___ S.W.2d at ___, slip op. at

59-60 (petitioner's Appendix A at A56-A57).

After discussing the "narrowing" requirement of the Eighth Amendment and construing the Tennessee death penalty statute, the court went on to make two holdings. First, after stating that Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), provided no rationale for holding constitutional under the Tennessee Constitution application of the felony-murder aggravating circumstance at a sentencing hearing for felony-murder, the court held such application unconstitutional under Article I, Section 16 of the Tennessee Constitution. Middlebrooks, ___ S.W.2d at ___, slip op. at 66 (petitioner's Appendix A at A62-A63). After doing so the court overruled a case, State v. Smith, 755 S.W.2d 757 (Tenn. 1988), which it read as allowing such application under the Tennessee Constitution. Middlebrooks, ___ S.W.2d at ___, slip op. at 64, 66 (petitioner's Appendix A at A61, A63). In addition to its Article I, Section 16, holding, the court also held that given its interpretation of the Tennessee death penalty statute, application of the felony-murder aggravating circumstance at a Tennessee felony-murder sentencing hearing violates the Eighth Amendment. Middlebrooks, slip op. at 66 (petitioner's Appendix A at A62-A63).

In a concurring opinion signed by two justices of the three-justice Middlebrooks majority, Tennessee Supreme Court Chief Justice Reid stated that the court's holding, "based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a

'demonstrably smaller and more blameworthy' class of murderers." Middlebrooks, ___ S.W.2d at ___, concurring opinion of Reid, C.J., slip op. at 2 (petitioner's Appendix A at A75) (quoting Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)).

VIII. SUMMARY OF THE ARGUMENT

A. THIS COURT LACKS JURISDICTION TO REVIEW THE MIDDLEBROOKS DECISION BECAUSE IT IS ALTERNATIVELY BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

As the summary of the Tennessee Supreme Court's opinion demonstrates above, that opinion includes a plain statement that it rests on state grounds:

> Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, see Tenn. Code Ann. sec. 40-35-111 (1982) and 40-35-114 (1990), and we are of the opinion that Article I, section 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well.

Middlebrooks, ___ S.W.2d at ___, slip op. at 53 (petitioner's Appendix A at A49-A50). The concurring opinion signed by two justices of the three-justice majority itself contains a plain statement that confirms the plain statement in the majority opinion.

> This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a 'demonstrably smaller and more blameworthy' class of murderers.

Middlebrooks, ___ S.W.2d at ___, concurring opinion of Reid, C.J., slip op. at 2 (petitioner's Appendix A at A75) (quoting Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Given these plain statements that the three-justice Middlebrooks

majority alternatively based its decision on the Tennessee Constitution, this Court lacks jurisdiction under 28 U.S.C. sec. 1257 (a) to review the Middlebrooks opinion.

Even if this Court should conclude that the above plain statements do not in and of themselves deprive this Court of jurisdiction under 28 U.S.C. sec. 1257 (a), a review of Middlebrooks demonstrates that the court alternatively based it on the Tennessee Constitution. The Tennessee Supreme Court 1) repeatedly mentioned the Tennessee Constitution throughout the opinion; 2) relied on a state court case apparently interpreting that state's constitution, the constitution after which Tennessee patterned its constitution; and 3) made in conjunction with a plain statement that it based its decision on Article I, Section 16 of the Tennessee Constitution a statement concerning state legislative action which is relevant to determining the scope of the Article I, Section 16 but not the Eighth Amendment to the federal constitution.

B. ASSUMING THAT THIS COURT HAS JURISDICTION TO REVIEW MIDDLEBROOKS, THAT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF ANY UNITED STATES CIRCUIT COURT

Middlebrooks does not conflict with Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Proffitt merely upheld the Florida death penalty statute on its face and did not hold the Florida statute forever immunized from constitutional attack in its application.

Middlebrooks does not conflict with Lowenfield v. Phelps, 484 U.S. 321, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), Byrne v. Butler,

845 F.2d 501 (5th Cir. 1988), or Perry v. Lockhart, 871 F.2d 1384, 1392-1393 (8th Cir. 1989). Those decisions involve death penalty statutes that provide a narrow definition of first-degree murder. Tennessee's statute provides a broad definition of first-degree murder.

Middlebrooks does not conflict with Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Zant v. Stephens, held that aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty. Given that Tennessee has a broad definition of first-degree murder, it is clear that the felony-murder aggravating circumstance when applied to one convicted of felony-murder does nothing to narrow the class of persons found guilty of first-degree murder to those upon whom the death penalty may fall.

Middlebrooks does not conflict with Bertolotti v. Dugger, 883 F.2d 1503, 1527-28 (11th Cir. 1989), because 1) Bertolotti does not address the same issue as Middlebrooks, and, 2) even if it did, respondent's jury specifically convicted him of felony-murder while the habeas petitioner in Bertolotti was convicted by a general verdict of first-degree murder upon a charge of felony-murder and premeditated murder.

Finally, Middlebrooks does not conflict with Enmund v. Florida, 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), or Tison v. Arizona, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), because the Tennessee Supreme Court did not strike respondent's death sentence upon a conclusion that

respondent did not meet the Enmund/Tison criteria for imposition of the death penalty upon a felony-murder conviction.

IX. ARGUMENT

This Court should deny petitioner's request for a writ of certiorari to the Tennessee Supreme Court for two reasons. First, this Court lacks jurisdiction to review the Tennessee Supreme Court's Middlebrooks decision because that decision is alternatively based on an adequate and independent state law ground, Article I, Section 16 of the Tennessee Constitution. Second, even assuming that this Court has jurisdiction to review Middlebrooks, the federal portion of that decision does not conflict with any decision of this Court or of any United States Circuit Court.

A. THIS COURT LACKS JURISDICTION TO REVIEW MIDDLEBROOKS BECAUSE THAT DECISION IS ALTERNATIVELY BASED ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

This Court lacks jurisdiction under 28 U.S.C. sec 1257 (a) to review a state court decision where an adequate and independent state law ground alternatively supports that decision. Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S.Ct. 459, 89 L.Ed.2d 789 (1945). For two reasons it is clear that the Tennessee Supreme Court alternatively based Middlebrooks on a state law ground. First, Middlebrooks contains plain statements that the Tennessee Supreme Court alternatively based the decision on Article I, Section 16 of the Tennessee Constitution. Second, even should this Court conclude that the plain statements contained in Middlebrooks

do not in and of themselves deprive this Court of jurisdiction, a review of the Middlebrooks opinion confirms the plain statements that the Tennessee Supreme Court alternatively based Middlebrooks on Article I, Section 16 of the Tennessee Constitution.

1. MIDDLEBROOKS CONTAINS PLAIN STATEMENTS THAT THE TENNESSEE SUPREME COURT ALTERNATIVELY BASED THAT DECISION ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

It is not always easy for a federal court to ascertain whether a state court based a decision on state or federal law. To remedy this problem, federal courts assume that a state court based an opinion on federal law if 1) the decision appears to rest on, or be interwoven with, federal law; and 2) the opinion does not clearly and expressly state that it rests on a state law ground. Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2555-56, ___ L.Ed.2d ___ (1991); Michigan v. Long, 463 U.S. 1032, 1044, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Thus, a state court seeking to base alternatively a decision on both federal and state law need only include in its opinion a plain statement that state law provides an independent basis for its decision. Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1044 n.10, ___ L.Ed.2d ___ (1989); Illinois v. Rodriguez, ___ U.S. ___, 110 S.Ct. 2793, 2798, ___ L.Ed.2d ___ (1990).

Middlebrooks contains two plain statements that the Tennessee Supreme Court based its decision alternatively on Article I, Section 16 of the Tennessee Constitution. The first plain statement appears at page 53 of the Middlebrooks slip opinion, page A49-A50 of petitioner's Appendix A. There, after stating the

argument in terms of duplication by an aggravating circumstance of the elements of the underlying murder conviction, the court states

> Our legislature ... has seen fit to prohibit such duplication by statute in non-capital sentencing, see Tenn. Code Ann. sec. 40-35-111 (1982) and sec. 40-35-114 (1990), and we are of the opinion that Article I, section 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well.

Middlebrooks, ___ S.W.2d at ___, slip op. at 53 (petitioner's Appendix A at A49-A50).

If any doubt exists that this plain statement deprives this Court of jurisdiction, another plain statement, in conjunction with the above plain statement, eliminates that doubt. In a concurring opinion signed by two justices of the three-justice Middlebrooks majority, the Chief Judge of the Tennessee Supreme Court states

> This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a 'demonstrably smaller and more blameworthy' class of murders.

Middlebrooks, ___ S.W.2d at ___, concurring slip op. of Reid, C.J., at 2 (petitioner's Appendix A at A75).

Comparing these plain statements to cases in which this Court has found the requisite plain statement missing clearly demonstrates that the Middlebrooks plain statements meet this Court's plain statement requirements.

This is not a case where the state court failed to mention the specific state law provision on which it relied. See Illinois v. Rodriguez, ___ U.S. at ___, 110 S.Ct. at 2798 (no plain statement where state court opinion did not mention any specific provision of the Illinois Constitution or the Illinois Constitution generally);

Michigan v. Chesternut, 486 U.S. 567, 571 n.3, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988) (no plain statement where state court does not mention state constitution); Ohio v. Johnson, 467 U.S. 493, 497 n.7, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) (no plain statement where state court refers to double jeopardy clause without specifying which clause, state or federal, to which it was referring); Oliver v. United States, 466 U.S. 170, 175 n.5, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (no plain statement where state court mentions only the federal constitution). Nor is this a case where the state court opinion contains only a passing or cryptic reference to state law. See Harris v. Reed, 109 S.Ct. at 1045 (no plain statement where state court opinion states only that the post-conviction petitioner's allegations "could have been raised (on) direct appeal"); Caldwell v. Mississippi, 472 U.S. 320, 326-28, 105 S.ct. 2633, 86 L.Ed.2d 231 (1985) (no plain statement where state court opinion makes only a cryptic reference to a state law case relying on a state procedural bar). Nor is this a case where the state court opinion briefly mentions the state law ground and states its holding as resting on federal law in conjunction with the state law. See Florida v. Riley, ___ U.S. ___, 109 S.Ct. 693, 695 n.1, ___ L.Ed.2d ___ (1989) (no plain statement where state court mentions state constitution in posing the question, once in body of opinion, and holds that activity violates the federal and state constitutions); New York v. P.J. Video, Inc., 475 U.S. 868, 872 n.4, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986) (no plain statement where state court opinion mentions the state constitution only once

in conjunction with the federal constitution); New York v. Class, 475 U.S. 106, 109-10, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986) (same). This is a case where the state court clearly and expressly stated twice that it based its decision on a specific provision of state law without including in those statements any mention of federal law. It is clear that Middlebrooks satisfies this Court's plain statement rule.

Even should this Court conclude that the above two plain statements do not in and of themselves deprive this Court of jurisdiction, a review of the Middlebrooks opinion confirms the plain statements that the Tennessee Supreme Court alternatively based Middlebrooks on the Tennessee Constitution.

2. EVEN SHOULD THIS COURT CONCLUDE THAT THE TWO PLAIN STATEMENTS IN MIDDLEBROOKS DO NOT IN AND OF THEMSELVES DEPRIVE THIS COURT OF JURISDICTION, A REVIEW OF THE MIDDLEBROOKS OPINION CONFIRMS THE PLAIN STATEMENTS THAT THE TENNESSEE SUPREME COURT ALTERNATIVELY BASED ITS DECISION ON ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

Even should this Court conclude that the above plain statements do not in and of themselves deprive this Court of jurisdiction, a review of the Middlebrooks opinion confirms the plain statements that the Tennessee Supreme Court alternatively based its holding on Article I, Section 16 of the Tennessee Constitution. The opinion 1) repeatedly mentions the Tennessee Constitution; 2) relies on a state court case apparently interpreting that state's constitution, the constitution after which Tennessee patterned its constitution; and 3) makes in conjunction with a plain statement that its decision is based on

Article I, Section 16 of the state constitution a statement concerning state legislative action which is relevant in determining the scope of Article I, Section 16 but not the Eighth Amendment to the federal constitution.

a. MIDDLEBROOKS REPEATEDLY MENTIONS THE TENNESSEE CONSTITUTION

After making the plain statement found at page 53 of the Middlebrooks slip opinion (page A49-A50 of petitioner's Appendix A), the court noted that the Eighth Circuit in Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), overruled, Perry v. Lockhart, 871 F.2d 1384, 1393 (8th Cir. 1989), held that duplication by an aggravating circumstance of the underlying capital felony violated the Eighth Amendment. The court then stated that it had previously refused to follow the Collins rationale in construing the Tennessee Constitution in State v. Smith, 755 S.W.2d 757, 768 (Tenn. 1988). Middlebrooks, ___ S.W.2d at ___, slip op. at 63-65 (petitioner's Appendix A at A59-A61). After discussing Smith and the case upon which it relied, Lowenfield v. Phelps, 484 U.S. 321, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), the court 1) stated that Lowenfield provided no rationale for finding duplication by an aggravating circumstance of an element of the underlying conviction constitutional under the Tennessee Constitution; and 2) expressly overruled Smith. Middlebrooks, ___ S.W.2d at ___, slip op. at 65-66 (petitioner's Appendix A at A61-A63). By thus mentioning the Tennessee Constitution throughout its opinion, the Tennessee Supreme Court confirmed its plain statements that it alternatively based its decision on Article I, Section 16 of the Tennessee Constitution.

See Uhler v. American Federation of Labor - Congress of Industrial Organizations, 468 U.S. 1310, 105 S.Ct. 5, 82 L.Ed.2d 896 (1984) (Rehnquist, J, denying stay of state court mandate) (repeated mentioning of state law coupled with citation to state constitution demonstrates state court opinion is based on state law).

b. MIDDLEBROOKS RELIES ON A STATE COURT CASE APPARENTLY INTERPRETING THAT STATE'S CONSTITUTION, THE CONSTITUTION AFTER WHICH TENNESSEE PATTERNED ITS CONSTITUTION

Immediately after making the plain statement found at page 53 of the Middlebrooks slip opinion (page A49-A50 of petitioner's Appendix A), the court noted that Tennessee's sister state North Carolina accepted the duplication challenge to its death penalty statute in State v. Cherry, 257 S.E.2d 551 (N.C. 1979). Middlebrooks, ___ S.W.2d at ___ slip op. at 53-54 (petitioner's Appendix A at A50-51). Tennessee patterned its constitution on the North Carolina Constitution, see Laska, A Legal and Constitutional History of Tennessee, 1772-1972, 6 Memphis State University Law Review 563, 582 (1976); Preamble and Declaration of Rights, Constitution of the State of Tennessee, so any decision of the North Carolina Supreme Court involving the North Carolina Constitution would be of special importance to the Tennessee Supreme Court in construing the Tennessee Constitution. While Cherry does not expressly state that it is based on the North Carolina Constitution, a careful reading of Cherry indicates that such is the case.

Cherry states that "it is well settled in this jurisdiction" that sentencing factors cannot duplicate elements of the underlying

felony. State v. Cherry, 257 at 567. The jurisdiction to which Cherry refers is obviously North Carolina, a jurisdiction covered by the North Carolina Constitution. Because Cherry does not cite any state statute as the basis for its hoilding, one may assume that the North Carolina Supreme Court based its holding on the document the people of North Carolina entrusted to its care, the North Carolina Constitution.

The fact that the Tennessee Supreme Court relied on a decision from the Supreme Court of the state upon which Tennessee patterned its constitution, apparently applying that state's constitution, provides further evidence that the Tennessee Supreme Court alternatively based its Middlebrooks decision on the Tennessee Constitution. See Uhler v. American Federation of Labor - Congress of Industrial Organizations, 468 U.S. 1310 (Rehnquist, J, denying stay of state court mandate) (discussion of treatment of issue by other state courts coupled with repeated mentioning of state law and citation to state constitution demonstrates state court opinion is based on state law).

c. MIDDLEBROOKS CONSIDERS STATE LEGISLATIVE ACTION IN CONJUNCTION WITH A PLAIN STATEMENT

The court prefaced its plain statement found at page 53 of the Middlebrooks slip opinion (page A49-A50 of petitioner's Appendix A), with the recognition that the Tennessee General Assembly prohibits duplication by a sentencing factor of an element of the underlying felony in non-capital sentencing. Middlebrooks, ___ S.W.2d at ___, slip op. at 53 (petitioner's Appendix A at A49-A50). This legislative action is reliable objective evidence of

contemporary values held inside the State of Tennessee, a consideration in determining whether such duplication runs afoul of Article I, Section 16 of the Tennessee Constitution but not the Eighth Amendment to the federal constitution. See Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2935, 2953, ___ L.Ed.2d ___ (1989); Fleming v. Zant, 386 S.E.2d 339, 341-42 (Ga. 1989).

In Penry, this Court considered whether execution of a mentally retarded person constituted cruel and unusual punishment in violation of the Eighth Amendment. Penry stated that the Eighth Amendment uses as a benchmark in determining whether a given punishment is cruel and unusual the "'evolving standards of decency that mark the progress of a maturing society.'" Penry, ___ U.S. at ___, 109 S.Ct. at 2953 (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)). Penry found legislation enacted by the country's legislatures the clearest and most reliable objective evidence of contemporary values for purposes of the federal Eighth Amendment. Penry, ___ U.S. at ___, 109 S.Ct. at 2953. Because only two legislatures had at time of Penry enacted legislation preventing the execution of a mentally retarded person, Penry concluded that no national consensus existed that executing mentally retarded persons is cruel and unusual punishment. Penry ___ U.S. ___, 109 S.Ct. at 2955.

In Fleming, the Georgia Supreme Court considered whether execution of a mentally retarded person constituted cruel and unusual punishment in violation of the state constitution. After recognizing that Penry found no Eighth Amendment violation in

executing a mentally retarded person because no national consensus existed against such executions, Fleming stated that the "standard of decency" relevant to the interpretation of the Georgia Constitution's cruel and unusual punishment clause was the standard of the people of Georgia, not the national standard. Fleming, 386 S.E.2d at 342. Fleming then found a consensus against executing mentally retarded persons within the State of Georgia based on a Georgia statute prohibiting such executions. Given that state legislative expression of current values inside the State of Georgia, the Georgia Supreme Court concluded execution of the mentally retarded inside the State of Georgia prohibited by the state constitution's cruel and unusual punishments clause. Fleming, 386 S.E.2d at 342.

Penry and Fleming teach that contemporary values as expressed in a nationwide survey of legislative action are relevant in interpreting the Eighth Amendment to the United States Constitution. Contemporary values as expressed in the legislation of a state, however, are relevant in interpreting that state's constitutional prohibition against cruel and unusual punishment.

The Tennessee Supreme Court prefaced a plain statement that it based its Middlebrooks decision on Article I, Section 16 of the Tennessee Constitution by noting that the Tennessee legislature has prohibited duplication by a sentencing factor of an element of the underlying offense in non-capital sentencing. Middlebrooks, ___ S.W.2d at ___, slip op. at 53, (petitioner's Appendix A at A49-A50). As Penry and Fleming teach, such consideration of state

legislative action is relevant to the scope of the state cruel and unusual punishment clause but not the Eighth Amendment. The Tennessee Supreme Court's consideration of Tennessee legislative action thus further demonstrates that that court meant what it said when it made its plain statements that it alternatively based its decision on Article I, Section 16 of the Tennessee Constitution.

3. CONCLUSION

This Court lacks jurisdiction to review Middlebrooks because the Tennessee Supreme Court alternatively based that decision on Article I, Section 16 of the Tennessee Constitution. The Tennessee Supreme Court made the requisite plain statements that Middlebrooks was so based, and confirmed these plain statements by 1) mentioning the Tennessee Constitution throughout the opinion; 2) relying on a state court case from the Supreme Court of the state after which Tennessee patterned its constitution that apparently interpreted that state's constitution; and 3) joining to a plain statement an account of legislative action that would only be relevant in interpreting the state constitution. Even should this Court conclude, however, that it does have jurisdiction to review Middlebrooks, the following section demonstrates that this Court need not do so because that decision does not conflict with any decision of this Court or of any United States Circuit Court.

B. ASSUMING THAT THIS COURT HAS JURISDICTION TO REVIEW MIDDLEBROOKS, THAT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF ANY UNITED STATES CIRCUIT COURT

Petitioner contends that Middlebrooks conflicts with Proffitt

v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), because Tennessee patterned its death penalty statute after Florida's and Proffitt held Florida's statute constitutional. See Petitioner's Petition at 12-13. Proffitt, however, merely held the Florida death penalty statute facially valid. Proffitt, 428 U.S. at 251, 253. That holding did not forever immunize the Florida statute from constitutional attack based on its application as petitioner apparently argues. See Erzonznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (holding a state statute facially valid means only that it is subject to an application by state courts that would be constitutional). Indeed, if petitioner's Proffitt argument were correct, this Court would have to overrule Godfrey v. Georgia, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), which held Georgia's death penalty statute unconstitutional as applied in that case even though this Court previously held that statute facially constitutional the same day it held Florida's statute facially constitutional. See Cregg v. Georgia, 428 U.S. 153, 198, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Nor does Middlebrooks conflict with Lowenfield v. Phelps, 484 U.S. 321, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), or Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988), as argued by petitioner. See Petitioner's Petition at 17-18. Lowenfield held that Louisiana's narrow definition of capital murder adequately narrowed the class of murderers to those upon whom the death penalty could constitutionally fall. Because the narrow capital murder

definition performs this narrowing function, no Eighth Amendment violation occurs in a Louisiana sentencing hearing for capital murder when a jury bases its death sentence on an element of the underlying conviction. Lowenfield, 484 U.S. at 241-46. Byrne merely applies the Lowenfield reasoning to another Louisiana death penalty case. Because Tennessee has a broad definition of first-degree murder, see Tenn. Code Ann. sec 39-2-202 (a), the Lowenfield reasoning does not apply in Tennessee, and Middlebrooks therefore does not conflict with it or with Byrne.

Nor does Middlebrooks conflict with Perry v. Lockhart, 871 F.2d 1384, 1392-1393 (8th Cir. 1989), as petitioner argues. See Petitioner's Petition at 18. Perry held that like Louisiana's definition of capital murder, Arkansas's narrow definition of capital murder adequately narrowed the class of murderers to those upon whom the death penalty could constitutionally fall. Because Tennessee has a broad definition of first-degree murder, the reasoning in Perry, like the reasoning in Lowenfield, does not apply in Tennessee, and Middlebrooks therefore does not conflict with Perry.

Nor does Middlebrooks conflict with Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), as petitioner argues. See Petitioner's Petition at 17. Zant v. Stephens, held that aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty. Given that Tennessee has a broad definition of first-degree murder, it is clear that the felony-murder aggravating circumstance when applied to one

convicted of felony-murder does nothing to narrow the class of persons found guilty of first-degree murder to those upon whom the death penalty may fall.

Nor does Middlebrooks conflict with Bertolotti v. Dugger, 883 F.2d 1503, 1527-28 (11th Cir. 1989), as petitioner argues. See Petitioner's Petition at 18. Bertolotti held that application of the felony-murder aggravating circumstance at the habeas petitioner's sentencing hearing for felony-murder did not provide the petitioner with an automatic death sentence in violation of the constitution. Bertolotti, 883 F.2d at 1527-28. Middlebrooks does not conflict with Bertolotti for two reasons. First, respondent's jury specifically convicted him of felony-murder while the habeas petitioner in Bertolotti was convicted by a general verdict of first-degree murder upon a charge of felony-murder and premeditated murder. See Bertolotti, 883 F.2d at 1507. Given that the petitioner in Bertolotti was so convicted, it was not clear whether application of the felony-murder aggravating circumstance duplicated an element of the underlying conviction. Second, Middlebrooks does not hold that the constitutional fault with applying the felony-murder aggravating circumstance to a person convicted of felony-murder is that such an occurrence provides for an automatic death sentence which is the specific argument Bertolotti rejects. See Bertolotti, 883 F.2d at 1527-28. Middlebrooks does not, therefore, conflict with Bertolotti.

Finally, Middlebrooks does not conflict with Enmund v. Florida, 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982),

or Tison v. Arizona, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), as petitioner argues. See Petitioner's Petition at 10-12, 13, 14. Those cases allow imposition of the death penalty upon a felony-murder conviction so long as the defendant kills, attempts to kill, intends that a killing take place or that lethal force will be imposed, or is substantially involved in the underlying felony and exhibits a reckless disregard or indifference to the value of human life. The Tennessee Supreme Court did not strike respondent's death sentence because it concluded respondent did not meet this criteria, and Middlebrooks therefore does not conflict with Enmund or Tison.

X. CONCLUSION

Because this Court does not have jurisdiction to review State v. Middlebrooks, ___ S.W.2d ___, No. 01-S-01-9102-CR-00008, slip op. at 51-67 (Petitioner's Appendix A at A48-A64) (Tenn. September 8, 1992), and that decision does not conflict with any decision of this Court or of any United States Circuit court, this Court should deny the petitioner's petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was provided to the Honorable Charles W. Burson, Attorney General & Reporter, Counsel of Record, to the Honorable Kathy M. Principe, Assistant Attorney General, and to the Honorable Rebecca L. Gundt, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37243-0485.

This 6th day of January, 1993.

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January 6, 1993

Joseph F. Spaniol, Jr., Clerk
U.S. Supreme Court
1 First St., N.E.
Washington, DC 20543

92-989

RE: State of Tennessee v. Donald Ray Middlebrooks

Dear Mr. Spaniol:

I am enclosing the original and one copy of Motion To Proceed On Appeal In Forma Pauperis and Affidavit In Support Of the Motion. I am also enclosing our Brief in Opposition To Petition For Writ on Certiorari to the Supreme Court of Tennessee together with twelve (12) copies.

Thank you for your assistance.

Very truly yours,

Lionel R. Barrett, Jr.

Lionel R. Barrett, Jr.

LRB/wm

Enclosure(s)

Supreme Court, U.S.
FILED
JUN 3 1993
OFFICE OF THE CLERK

No. 92-989

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

JOINT APPENDIX

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Petition for Certiorari Filed December 7, 1992
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TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Indictment	2
Jury Instructions from Guilt Phase	6
Verdict Form from Guilt Phase	22
Jury Instructions from Sentencing Phase	25
Verdict from Sentencing Phase	36
Opinion of the Supreme Court of Tennessee*	
Judgment Entry of the Supreme Court of Tennessee	38

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* Pursuant to Rule 26.1 of this Court, the opinion of the Supreme Court of Tennessee is not reprinted in this Joint Appendix since it appears in the appendix to the petition for certiorari at A1-A86.

RELEVANT DOCKET ENTRIES

Date	Proceeding
September 14, 1987	Middlebrooks indicted for the first-degree murder, aggravated kidnapping, armed robbery and aggravated sexual battery of Kerrick Majors
September 15, 1989 – September 22, 1989	Trial and sentencing hearing
September 8, 1992	Tennessee Supreme Court affirms conviction but reverses sentence of death

INDICTMENT

State of Tennessee, Davidson County

COUNT ONE

SEPTEMBER **Term of the Criminal Court, 1987**

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged to inquire for the body of the County of Davidson, and State aforesaid, upon their oath aforesaid, present:

That DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

of said County, heretofore, to-wit: On the 26th *day of* April *, 19* 87*, with force and arms, in the County aforesaid and prior to the return of this indictment, unlawfully, feloniously, willfully, deliberately, premeditatedly and maliciously or while in the perpetration of a felony, to wit: Kidnapping or Larceny, did make an assault upon the body of one*

Kerrick Lamar Majors

and the said DONALD RAY MIDDELBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

then and there did unlawfully, feloniously, willfully, deliberately, premeditatedly, and of ~~x~~their *malice aforethought, kill and murder the said* Kerrick Lamar Majors

against the peace and dignity of the State.

State of Tennessee, Davidson County

COUNT TWO

SEPTEMBER **TERM OF THE CRIMINAL COURT, 1987**

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged, to inquire for the body of the County of Davidson and State aforesaid, upon their oath aforesaid, present: That DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

heretofore, to-wit, on the 26th *day of* April *, 19* 87 and prior to the return of this indictment *with force and arms, in the County aforesaid, unlawfully,* and feloniously did seize, confine, inveigle, abduct, conceal, kidnap or carry away another, Kerrick Lamar Majors, with the felonious intent to cause the said Kerrick Lamar Majors to be confined secretly against his will, while the said DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS were armed with a deadly weapon, to wit: a knife, in violation of Section 39-2-301 Tennessee Code Annotated and against the peace and dignity of the State of Tennessee.

State of Tennessee, Davidson County

COUNT THREE

SEPTEMBER TERM OF THE CRIMINAL COURT, 19 87

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn, and charged to inquire for the body of the County of Davidson, and State aforesaid, upon their oath aforesaid, present: That: DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

heretofore, and prior to the finding of this indictment, to-wit, on the 26th *day of* April , *19* 87, *with force and arms, in the County aforesaid, unlawfully and feloniously did make an assault upon the body of one* Kerrick Lamar Majors , and him/~~she~~ the said in fear and danger of his/~~her~~ life, and then and there unlawfully, feloniously, and violently did steal, take, and carry away from the person and against the will of the said Kerrick Lamar Majors

certain personal property, to-wit: jewelry, a better description of which being to the Grand Jurors unknown

of the value of under Two Hundred ($200.00) *DOLLARS the property of the said* Kerrick Lamar Majors , *said robbery being accomplished by the use of a deadly weapon, to-wit: a* knife

contrary to the form of the statues in such cases made and provided, and against the peace and dignity of the State of Tennessee.

State of Tennessee, Davidson County

COUNT FOUR

SEPTEMBER TERM OF THE CRIMINAL COURT, 1987

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged, to inquire for the body of the County of Davidson and State aforesaid, upon their oath aforesaid, present: That DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

heretofore, to-wit, on the 26th *day of* April , *19* 87 and prior to the return of this indictment

with force and arms, in the County aforesaid, unlawfully, and feloniously did have unlawful sexual contact with another, to wit: Kerrick Lamar Majors, with force or coercion, while the said DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS were armed with a deadly weapon, to wit: a knife, and the said DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDELBROOKS were aided and abetted by one or more persons, in violation of Section 39-2-606 Tennessee Code Annotated and against the peace and dignity of the State of Tennessee.

/s/ Thomas H. Shriver
Attorney-General

JURY INSTRUCTION FROM GUILT PHASE

* * *

[p. 1719] State of Tennessee versus Donald Ray Middlebrooks. Case number – 87F-1681. Member of the Jury: Count one of the indictment in this case charges the defendant, Donald Ray Middlebrooks, with the offense of murder in the first degree. This offense embraces the lesser included offense of murder in the second degree, voluntary manslaughter, and involuntary [p. 1720] manslaughter.

* * *

[p. 1727] All persons aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders and punished as such. An aider and abettor is one who advises, counsels, procures or [p. 1728] encourages another to commit a crime.

The law does not require a strict, actual, eyewitness presence at the scene of the crime. Only a constructive presence is necessary to charge one as an aider and abettor. As a general rule, one is deemed to be constructively present if he is, at the time, performing any act in furtherance of the felony, or is in a position to give information which would aid the actual perpetrator or which would prevent others from discouraging and stopping the perpetrator. It is immaterial at which – excuse me, it is immaterial at what distance the alleged aider and abettor may be from the scene of the crime.

Constructive or actual presence, however, is not sufficient to make one a principal of the crime. There must

be some evidence, at least circumstantial, that the defendant knowingly participated in the crime. The defendant must have had knowledge of the crime being committed, and an intent to aid and abet. An aider and abettor, who has knowledge of the principal's unlawful intent, and assists the principal, is guilty in the same degree as the principal. When the aider and abettor does not share in the principal's intent, however, but is controlled by his own intent, the degree of guilt of the aider and abettor is not necessarily that of the principal. In determining the degree of the defendant's guilt, you should consider his criminal intent, and not the [p. 1729] intent and degree of guilt of the principal offender, whom the defendant is accused of aiding and abetting.

* * *

[p. 1730] Count One. I shall now proceed to explain to you what in law it takes to constitute the offense of murder in the first degree, as charged in count one of the indictment.

[p. 1731] Section 39-2-201 of the *Tennessee Code Annotated* provides as follows:

If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

Section 39-2-202A of the *Tennessee Code Annotated* provides as follows:

Every murder perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, is murder in the first degree.

[p. 1732] Any person who willfully, deliberately, maliciously, and with premeditation kills another person is guilty of murder in the first degree.

For you to find the defendant guilty of murder in the first degree which is unlawful, malicious, willful, deliberate and premeditated, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was malicious; that is, that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse;

(3) that the killing was willful; that is, that the defendant intended to take the life of the alleged victim;

(4) that the killing was deliberate; that is, with cool purpose; and

(5) that the killing was premeditated.

Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless, at and before the killing, the

wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do an injury to another, a design formed in the mind of doing mischief to another.

[p. 1733] Express malice is actual malice against the party slain, and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and heart regardless of social duty and fatally bent on mischief. Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed, but death resulted from a consciously, unlawful act done intentionally, and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event, there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice.

If a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then you may infer malice sufficient to support a conviction of murder in the first degree, which is unlawful, malicious, willful, deliberate, and premeditated, but, again, this inference may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant, or exists in the evidence of the State. A deadly weapon is any weapon or instrument which, from the manner in which it is used, or attempted to be used, is likely to produce death or cause [p. 1734] great bodily injury.

Malice cannot be inferred from deadly intent only, because the deadly intent may be justifiable under the law, as where one willfully kills another to save his own life, or to save himself from great bodily harm, and the danger is imminent and immediate, or when the intent to kill is produced by anger, for if it were sudden and upon reasonable provocation, the killing might or might not be manslaughter, but it would not be murder.

You are reminded that the State always has the burden of proving every element of the crime charged beyond a reasonable doubt. A permissible inference may or may not be drawn from an elemental fact from proof by the State of a basic fact. However, all inferences permitted to be drawn may be rebutted. An inference does not place any burden of proof of any kind upon the defendant.

Premeditation means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged death of the deceased must be carefully considered in [p. 1735] order to determine whether the accused was sufficiently free from excitement and passion to be capable of premeditation. Passion does not always reduce the crime below murder in the first degree, since a person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and, to a large extent, controlled by passion at the time. If

the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or an excited state when the design was carried into effect.

In addition to indicting the defendant for murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated, in Count One in the same count, the State has indicted the defendant, alternatively, for murder in the first degree in the perpetration of a felony, to-wit: kidnapping or larceny. This offense has different elements that murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated. I shall now proceed to explain to you what in law it takes to constitute the offense of first degree murder in the perpetration of a felony.

A person commits murder in the first degree in the perpetration of a felony if he kills any person during the perpetration of, or attempt to perpetrate certain specified felonies, including kidnapping or larceny. Kidnapping is the [p. 1736] offense of forcibly or unlawfully confining, inveigling, or enticing away another, with the intent of causing him to be secretly confined against his will. Larceny is the offense of felonious taking and carrying away the personal goods of another, and is either grand or petit in degree.

For you to find the defendant guilty of murder in the first degree in the perpetration of a felony, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was committed during the alleged perpetration or attempt to perpetrate the alleged kidnapping or larceny; that is, that the killing was closely connected to the alleged kidnapping or larceny, and was not a separate, distinct, and independent event; and

(3) that the defendant specifically intended to commit the alleged kidnapping or larceny.

If you should find that the above three elements exist beyond a reasonable doubt, it is not necessary that the State prove an intention to kill, or that the alleged killing was done willfully, deliberately, with premeditation, and with malice.

If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that [p. 1737] the defendant, Donald Ray Middlebrooks, is guilty of murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated, or murder in the first degree in the perpetration of a felony, as charged alternatively in Count One of the indictment, you should find him guilty.

If you so find, then it shall be your duty after a separate sentencing hearing to determine whether the defendant will be sentenced to death or life imprisonment, but you will not consider punishment for this offense at this time.

On the other hand, if you find the defendant, Donald Ray Middlebrooks, not guilty of murder in the first degree which is unlawful, malicious, deliberate and premeditated, or murder in the first degree in the perpetration of a felony, as charged alternatively in Count One of

the indictment, or if you have a reasonable doubt thereof, then your verdict must be not guilty as to both of these offenses, and next proceed to determine his guilt or innocence as to the lesser included offense of murder in the second degree.

I shall now proceed to explain to you what in law it takes to constitute the offense of murder in the second degree as included in Count One of the indictment.

Section 39-2-202(A) of the *Tennessee Code Annotated* provides as follows:

Every murder perpetrated by means of poison, lying [p. 1738] in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, is murder in the first degree.

Section 39-2-211(A) of the *Tennessee Code Annotated* further provides:

All other kinds of murders shall be deemed murder in the second degree.

Any person who kills another person with malice aforethought, either express or implied, is guilty of murder in the second degree.

For you to find the defendant guilty of murder in the second degree while employing a firearm, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully and willfully killed the alleged victim, and;

(2) that the killing was malicious.

If one person, upon a sudden heat of passion, without adequate provocation, and disconnected with any previously formed design to kill, kills another willfully and maliciously, such killing is unlawful, and is murder in the [p. 1739] second degree.

Malice is an essential ingredient of this offense, and it may be either express or implied. The definition of malice, the circumstances under which it exists, and when and from what malice may be inferred and proper rebuttal made are set forth under the jury's charge on murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated, and you should refer to that portion of the charge as you deem it appropriate or necessary to do so.

If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that the defendant, Donald Ray Middlebrooks, is guilty of murder in the second degree, as included in Count One of the indictment, then you should find him guilty.

The Court will thereafter set the punishment after a separate sentencing hearing.

On the other hand, if you find the defendant, Donald Ray Middlebrooks, not guilty of murder in the second degree, as included in Count One of the indictment, or if you have a reasonable doubt thereof, then your verdict must be not guilty as to this offense, and next proceed to

determine his guilt or innocence as to the lesser included offense of voluntary manslaughter.

I shall now proceed to explain to you what in law it takes to constitute the offense of voluntary manslaughter, as [p. 1740] included in Count One of the indictment.

Section 39-2-221 of the *Tennessee Code Annotated* provides as follows:

Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act.

Any person who intentionally kills another person, without malice, but upon a sudden heat of passion produced by provocation adequate to obscure the reason of an ordinary person is guilty of voluntary manslaughter.

For you to find the defendant guilty of voluntary manslaughter, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was willful; that is, the defendant intended to take the life of the alleged victim;

(3) that the defendant acted in a state of passion sufficient to obscure his reason; and

(4) that the passion was produced by a reasonable and adequate provocation; that is, in the mind of an average reasonable person, the provocation would stir

resentment likely to cause violence, obscure the reason, and lead to action from passion rather than judgment.

[p. 1741] If the intention and the act are the result of impulse and passion, the idea of malice is negated. Killing on a sudden heat of passion, without malice, distinguishes voluntary manslaughter from murder in the second degree.

If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that the defendant, Donald Ray Middlebrooks, is guilty of voluntary manslaughter, as included in Count One of the indictment, then you should find him guilty.

The Court will thereafter set the punishment after a separate sentencing hearing.

On the other hand, if you find the defendant, Donald Ray Middlebrooks, not guilty of voluntary manslaughter, as included in Count One of the indictment, or if you have a reasonable doubt thereof, then your verdict must be not guilty as to this offense, and next proceed to determine his guilt or innocence as to the lesser included offense of involuntary manslaughter.

I shall now proceed to explain to you what in law it takes to constitute the offense of involuntary manslaughter, as included in Count One of the indictment.

Section 39-2-221 of the *Tennessee Code Annotated* provides as follows:

Manslaughter is the unlawful killing of another without malice, either express or implied, which may be [p. 1742] either voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act. Any

person who kills another person while committing an unlawful act, or an act not strictly unlawful in itself, but done with gross and culpable negligence, and while not intending death nor bodily harm to result from commission of the act, though death was the natural and probable result of the act, is guilty of involuntary manslaughter.

For you to find the defendant guilty involuntary manslaughter while – excuse me. There is a typographical error. I'm striking a clause, obscuring it with ink, and initialing that, and pay no attention to that whatsoever. It is just a clerical error. I'll start the sentence again.

For you to find the defendant guilty of involuntary manslaughter, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing resulted from the defendant's commission of:

(a) an unlawful act, or

(b) an act not strictly unlawful in itself, but done with gross and culpable negligence; and

[p. 1743] (3) that death was the natural and probable result of the defendant's act.

Gross and culpable negligence is negligence that the defendant knew or reasonably should have known might endanger human life; it is not enough that the defendant

was merely guilty of want of due care, inadvertence, or inattention.

If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that the defendant, Donald Ray Middlebrooks, is guilty of involuntary manslaughter, as included in Count One of the indictment, then you should find him guilty.

On the other hand, if you find the defendant, Donald Ray Middlebrooks, not guilty of involuntary manslaughter, as included in Count One of the indictment, or if you have a reasonable doubt thereof, then your verdict must be not guilty as to this offense, and next proceed to determine his guilt or innocence as to Count Two of the indictment.

* * *

[p. 1758] You will be provided with a form for all possible verdicts in this case. For each count, the jury will check the appropriate verdict on the form, and your foreperson will sign the verdict form. The verdict form which you will receive reads as follows:

In the Criminal Court for Davidson County, Tennessee, Division Three.

State of Tennessee versus Donald Ray Middlebrooks.

Number 87-F-1682, Verdict Form.

Count One

We, the jury, find the defendant, Donald Ray Middlebrooks:

(1) not guilty of the charged offense, or any specified lesser included offense, or

(2) guilty of murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated, as charged in Count One of the indictment, or

[p. 1759] (3) guilty of murder in the first degree in the perpetration of a felony, to-wit: kidnapping as charged in Count One of the indictment, or

(4) guilty of murder in the first degree in the perpetration of a felony, to-wit: larceny as charged in Count One of the indictment, or

(5) guilty of murder in the second degree as included in Count One of the indictment, or

(6) guilty of voluntary manslaughter as included in Count One of the indictment, or

(7) guilty of involuntary manslaughter as included in Count One of the indictment.

Count Two

We, the jury, find the defendant, Donald Ray Middlebrooks:

(1) not guilty of the charged offense, or any specified lesser included offense, or

(2) guilty of aggravated kidnapping, as charged in Count Two of the indictment, or

(3) guilty of kidnapping as included in Count Two of the indictment.

Count Three

We the jury, find the defendant, Donald Ray [p. 1760] Middlebrooks:

(1) not guilty of the charged offense, or any specified lesser included offense, or

(2) guilty of robbery by use of a deadly weapon, as charged in Count Three of the indictment, or

(3) guilty of robbery, as included in Count Three of the indictment, or

(4) guilty of larceny from the person as included in Count Three of the indictment.

Count Four

We, the jury, find the defendant, Donald Ray Middlebrooks:

(1) not guilty of the charged offense, or any specified lesser included offense, or

(2) guilty of aggravated sexual battery of Kerrick Lamar Majors on the 26th day of April, 1987, as charged in Count Four of the indictment, or

(3) guilty of sexual battery of Kerrick Lamar Majors on the 26th day of April, 1987, as included in Count Four of the indictment.

On each count, there is the instruction to check one before the choices are provided. The form continues:

This is our verdict.

[p. 1761] This the (blank) day of September, 1989, with a signature line for the foreperson.

* * *

VERDICT FORM FROM GUILT PHASE

IN THE CRIMINAL COURT FOR
DAVIDSON COUNTY, TENNESSEE
DIVISION III

STATE OF TENNESSEE)
VS.)
) No. 87-F-1682
DONALD RAY MIDDLEBROOKS)

VERDICT FORM

COUNT ONE [check one]

We, the Jury, find the defendant, Donald Ray Middlebrooks,

1. __ not guilty of the charged offense or any specified lesser included offense.

OR

2. __ guilty of Murder in the First Degree Which is Unlawful, Malicious, Willful, Deliberate and Premeditated as charged in Count One of the indictment.

OR

3. ✓ guilty of Murder in the First Degree in the Perpetration of a Felony, to-wit: Kidnapping as charged in Count One of the indictment.

OR

4. __ guilty of Murder in the First Degree in the Perpetration of a Felony, to-wit: Larceny as charged in Count One of the indictment.

OR

5. __ guilty of Murder in the Second Degree as included in Count One of the indictment.

OR

6. __ guilty of Voluntary Manslaughter as included in Count One of the indictment.

OR

7. __ guilty of Involuntary Manslaughter as included in Count One of the indictment.

COUNT TWO [check one]

We, the Jury, find the defendant, Donald Ray Middlebrooks,

1. __ not guilty of the charged offense or any specified lesser included offense.

OR

2. ✓ guilty of Aggravated Kidnapping as charged in Count Two of the indictment.

OR

3. __ guilty of Kidnapping as included in Count Two of the indictment.

COUNT THREE [check one]

We, the Jury, find the defendant, Donald Ray Middlebrooks,

1. ✓ not guilty of the charged offense or any specified lesser included offense.

OR

2. __ guilty of Robbery by Use of a Deadly Weapon as charged in Count Three of the indictment.

OR

3. __ guilty of Robbery as included in Count Three of the indictment.

OR

4. __ guilty of Larceny from the Person as included in Count Three of the indictment.

COUNT FOUR [check one]

We, the Jury, find the defendant, Donald Ray Middlebrooks,

1. ✓ not guilty of the charged offense or any specified lesser included offense.

OR

2. __ guilty of Aggravated Sexual Battery of Kerrick Lamar Majors on the 26th day of April, 1987, as charged in Count Four of the indictment.

OR

3. __ guilty of Sexual Battery of Kerrick Lamar Majors on the 26th day of April, 1987, as included in Count Four of the indictment.

This is our verdict.

This the 19 day of September, 1989.

/s/ B. Lanham
FOREPERSON

Jury Instructions from Sentencing Phase

* * *

[p. 2192] Ladies and gentlemen of the Jury, you have found the defendant guilty beyond a reasonable doubt of murder in the first degree as charged in Count One of Indictment Number 87-F-1682.

It is now your duty to determine within the limits prescribed by law the penalty which shall be imposed as punishment for this offense. *Tennessee Code Annotated* Section 39-2-202(b) provides that a person convicted of murder in the first degree shall [p. 2193] be punished by death or by imprisonment for life.

The evidence and arguments in this hearing have been completed. And it is my duty now to instruct you as to the law. The law applicable to this case is stated in these instructions, and it is your duty to carefully consider all of them. The order in which these instructions are given is no indication of their relative importance. You should not single out one or more of them to the exclusion of another or others, but should consider each one in the light of and in harmony with the others.

At times during this hearing, I have ruled upon the admissibility of evidence. You must not concern yourself with these rulings. Neither by such rulings, these instructions, nor any other remarks which I have made, do I mean to indicate any opinion as to the facts or as to what your verdict should be.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and

applying the law, but they are not evidence. If any statements or arguments were made that you believe are not supported by the evidence, you should disregard them.

You are the exclusive judges of the facts [p. 2194] in this case. Also, you are the exclusive judges of the law under the direction of the Court. You should apply the law to the facts in deciding this case. You should consider all of the evidence in the light of your own observations and experience in life.

You are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony. If there are conflicts in the testimony of the different witnesses, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely for the law presumes that all witnesses are truthful.

In forming your opinion as to the credibility of a witness, you may look to the proof, if any, of his or her general character, the evidence, if any, of the witness' reputation for truth and veracity, the intelligence and respectability of the witness, his or her interest or lack of interest in the outcome of the trial, his or her feelings, his or her apparent fairness or bias, his or her means of knowledge, the reasonableness of his or her statements, his or her appearance and demeanor while testifying, his or her contradictory statements as to material matters, if any are shown, and all the evidence in the case tending [p. 2195] to corroborate or to contradict him or her.

A witness may be impeached by a careful cross-examination involving the witness in contradictory, unreasonable and improbable statements. However,

immaterial discrepancies or differences in the statements of witnesses do not affect their credibility unless it should plainly appear that some witness has willfully testified falsely.

When a witness is thus impeached, the jury has the right to disregard his or her evidence and treat it as untrue except where it is corroborated by other credible testimony or by the facts and circumstances proved during the trial or the sentencing hearing.

The defendant has not taken the stand to testify as a witness, but you shall place no significance on this fact. The burden is on the state to prove beyond a reasonable doubt any aggravating circumstance relied on. He is not required to take the stand in his own behalf, and his election not to do so cannot be considered for any purpose against him, nor can any inference be drawn from such fact.

Generally, a witness may not testify as to his opinions or conclusions. But the Court may permit a witness who has special knowledge or experience [p. 2196] on a particular question to testify as an expert on that question. An expert witness may state an opinion and give reasons for his testimony.

Expert testimony should be received by you with caution. While expert testimony is sometimes the only means of, or the best way of, reaching the truth, yet it is largely a field of speculation beset with pitfalls and uncertainties and requires careful and intelligent evaluation on your part if it is to be a valid means of reaching the truth.

You are not bound to accept expert testimony, but you should give it such weight and value as you think it deserves, along with all the other evidence in the case, governed by the purpose of arriving at the truth.

For the purpose of your deliberation and the return of your verdict, you are not to consider, speculate on, or discuss matters pertaining to the implementation of your verdict. You are to assume that whether you impose a sentence of death or of life imprisonment, the verdict you impose will be carried out.

Some of you may have been exposed to pretrial publicity in this case. I instruct you that you can consider no information in reaching your verdict other [p. 2197] than the evidence you hear in the courtroom. That should be "have heard in the courtroom." It would be further impermissible for you to mention during deliberations to any other juror any information that you recall seeing, hearing, or reading in the media or otherwise related to this case other than what you hear or see in the courtroom. This case must be decided solely upon the evidence that you heard in the courtroom.

You have reported that you have found the defendant, Donald Ray Middlebrooks, guilty of murder in the first degree. The offense of murder in the first degree is punishable by death by electrocution or by imprisonment for life.

Members of the Jury, you must decide from all the proof in this case whether or not the punishment shall be death by electrocution or life imprisonment in Count One of this case.

Our statutory law provides that the Jury shall fix the punishment after a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.

You have now heard all the evidence to be presented in the trial and the sentencing hearing [p. 2198] of this case, including all the evidence as to whether there were any aggravating circumstances and whether there were any mitigating circumstances, all of which you will carefully weigh and consider. You shall not take account of any other facts or circumstances as the basis for deciding whether the death penalty would be appropriate in this case.

No death penalty shall be imposed unless you unanimously find that the state, during the trial and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specified statutory aggravating circumstances:

Number one. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

Number two. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit kidnapping.

In determining whether or not the state has proved aggravating circumstance number one above, you are governed by the following definitions:

Heinous means grossly wicked or reprehensible, abominable, odious, vile.

[p. 2199] Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable.

Cruel means disposed to inflict pain or suffering, causing suffering, painful.

Torture means the infliction of severe physical or mental pain upon the victim while he remains alive and conscious.

Depravity means moral corruption, wicked or perverse act.

In determining the alleged aggravating circumstance number two, you are to refer to the following definitions:

Kidnapping is defined as follows:

Any person who forcibly or unlawfully confines, inveigles, or entices away another with the intent to cause him to be secretly confined against his will is guilty of the offense of kidnapping.

A confinement of a person is deemed to be against the person's will if assent to the confinement is induced by force, threat, or deception.

To inveigle a person means to lure, entice, or lead him astray by false representations, promises, or by other deceitful means.

To kidnap a person means to forcibly or unlawfully confine, inveigle, or entice away another [p. 2200] with the intent to cause him to be secretly confined.

Before you may find that either one of the aggravating circumstances exists, each of you must unanimously agree that the state has proved that circumstance as defined hereinbefore beyond a reasonable doubt.

You are to presume that any alleged aggravating circumstance does not exist. This presumption remains unless and until each and every one of you is satisfied from the evidence that the specific aggravating circumstance is proved. If you have a doubt, based upon reason, concerning any of the aggravating circumstances, you shall not use that circumstance in the course of further deliberations.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of your findings. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty is not demanded by the law to determine the certainty of your findings, but moral certainty is required as to every proposition of proof requisite to determine the certainty of your findings as to the aggravating circumstance or circumstances.

[p. 2201] Your determination may not proceed further unless and until you unanimously find beyond a reasonable doubt that one or more specified aggravating circumstances exists. If you are unable to reach such an agreement after reasonable and diligent effort, your verdict shall be life, and you shall proceed no further.

If you unanimously determine that the state has proved beyond a reasonable doubt one or more of the

specified aggravating circumstances, then you must go on to consider mitigating circumstances.

As to a determination of mitigating circumstances, you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight, nor are you to gauge whether their existence is shown beyond a reasonable doubt. Instead, when you consider mitigating circumstances, each of you must decide for yourself whether mitigating circumstances may exist and if so, how much weight each deserves. If you conclude that any evidence supports a mitigating circumstance, then you should consider that mitigating circumstance to be established and then determine the weight to which it is entitled.

Tennessee Code Annotated Section 39-2-203, [p. 2202] subpart J, provides that in arriving at the punishment, the Jury shall consider as heretofore indicated any mitigating circumstances which shall include, but not be limited to, the following:

Number one. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Number two. The defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.

Number three. The defendant acted under extreme duress or under the substantial domination of another person.

Number four. The youth or advanced age of the defendant at the time of the crime.

Number five. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication, which was insufficient to establish a defense to the crime, but which substantially affected his judgment.

Number six. Any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is [p. 2203] supported by the evidence.

If the jury unanimously determines that one or more statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death. If the death penalty is the decision of the Jury, the members of the Jury shall then complete the attached form entitled, Punishment of Death. The Jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found.

Further, the Jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the Jury shall affix his or her signature to the said written finding and then return said written verdict to the Court.

If the Jury unanimously determines that no statutory aggravating circumstance or circumstances have been

proved by the state beyond a reasonable doubt, or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable [p. 2204] doubt, but that said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

I further instruct you that if the weight of the mitigating circumstances equals the weight of any or all aggravating circumstances you find to be proven beyond a reasonable doubt, your verdict must be life. The Members of the Jury shall then complete the attached form entitled, Punishment of Life Imprisonment, by affixing their signatures thereto and returning the written verdict of the Jury to the Court.

You are to complete and sign only the appropriate punishment form. The other punishment form is to be left incomplete and unsigned.

You can have no prejudice or sympathy or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality as you think justice and truth dictate.

The verdict must represent the considered judgment of each Juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with [p. 2205] one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual

judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect or the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You may now retire to the jury room for your deliberations in setting punishment for the defendant solely and alone upon the evidence introduced upon the trial and sentencing hearing.

* * *

Verdict from Sentencing Phase

* * *

[p. 2215] THE COURT: Let me ask you if the jury has reached a unanimous verdict as to [p. 2216] punishment?

JURY FOREPERSON: Yes.

THE COURT: Has the appropriate form been completed and/or signed by you and by each member of the jury?

JURY FOREPERSON: Yes.

THE COURT: Mr. Middlebrooks, if you would stand and face the jury.

(WHEREUPON, the defendant stands.)

THE COURT: Ms. Lanham, I will ask if you will announce the verdict of the jury.

JURY FOREPERSON: Punishment of death.

THE COURT: Would you pass the form to the court officer, and pass that to me. You may be seated. Mr. Middlebrooks you may be seated and counsel.

I am going to read for the record the form filled out by the jury, and then you will be polled as to your verdict.

The form completed and submitted to the court is that entitled Punishment of Death. We, the jury, unanimously find the following listed [p. 2217] statutory,

aggravating circumstance or circumstances. The jury has listed in writing the murder was especially heinous, atrocious or cruel and that it involved torture. The murder was committed while the defendant was engaged in committing kidnapping. The form further provides, we [sic] that the jury unanimously find that the statutory aggravating circumstance or circumstances so listed above outweigh the mitigating circumstance or circumstances. And further provides: Therefore, we, the jury, unanimously find that the punishment for the defendant, Donald Wayne Middlebrooks, shall be death.

I have reviewed the form and it appears to have been signed by the foreperson and each juror. The jury at this time will be polled as to whether this is your signature and your verdict that was announced by your foreperson, and is provided for in this form. And the clerk will call your name and say, "Is this your signature and verdict." The reference to signature refers to the verdict form.

(WHEREUPON, the jury was polled and all answered affirmatively.)

Judgment of the Supreme Court

SUPREME COURT, NASHVILLE

MB67B/326

STATE OF TENNESSEE Plaintiff-Appellee	Appeal No. 01S01-9102-CR-00008
vs.	Davidson Criminal No. 87-F-1682 Below
DONALD RAY MIDDLEBROOKS, Defendant-Appellant	Offense: First-degree Felony Murder and Aggravated Kidnapping.
	DEATH PENALTY
	Conviction Affirmed; Sentence Reversed and Remanded for Re-sentencing.

JUDGMENT

Came the appellant, Donald Ray Middlebrooks, by counsel, and also came the Attorney General on behalf of the State, and this case came on to be heard upon the record on appeal from the Criminal Court of Davidson County; and upon consideration thereof, this Court affirms appellant's conviction, but reverses the sentence on the grounds that the aggravating circumstance set out in Tenn. Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder.

In accordance with the opinion filed herein, it is, therefore, ordered and adjudged by this Court that the

appellant's conviction of guilt is affirmed. It is further ordered and adjudged by this Court that the case is remanded to the Criminal Court of Davidson County for re-sentencing where the State will be free to reseek the death penalty if it so desires.

The State of Tennessee will pay the costs of this appeal. 9/8/92.

(Drowota and O'Brien, JJ., concurring in Parts I and II and dissenting in Part III – Separate Opinion.
Reid, C.J., and Daughtrey, J., concurring in Parts I and III and dissenting in Part II – Separate Opinion)

Supreme Court, U.S.
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No. 92-989

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

In a capital felony murder case, does the Eighth Amendment prohibit the sentencer from relying on a statutory aggravating circumstance that the murder was committed in the perpetration of a felony?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE

A. Procedural History 1

B. Trial and Sentencing 3

SUMMARY OF ARGUMENT 7

ARGUMENT

THE EIGHTH AMENDMENT IS NOT VIOLATED WHERE THE SENTENCER IN A CAPITAL FELONY MURDER CASE RELIES ON A STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN THE PERPETRATION OF A FELONY 10

A. Tennessee's felony murder aggravating circumstance is a principled criterion which guides the sentencer's discretion in deciding whether the death penalty should be imposed in a particular case 10

1. The felony murder aggravating circumstance sufficiently narrows the class of murderers 11

2. The felony murder aggravating circumstance narrows the class of murderers in a principled manner 16

B. Tennessee's capital sentencing scheme as a whole ensures compliance with the Eighth Amendment 22

TABLE OF CONTENTS – Continued

Page

C. This case does not present an issue of proportionality because the use of the felony murder aggravating circumstance does not violate the Eighth Amendment proportionality requirement 25

D. This case does not present a "vagueness" problem because the felony murder aggravating circumstance is clear and unambiguous 26

E. This Court should reject the creation of a new Eighth Amendment requirement 27

CONCLUSION 29

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES CITED

Arave v. Creech, 507 U.S. ___, 113 S. Ct. 1534 (1993) 12, 13, 24

Cabana v. Bullock, 474 U.S. 376 (1986) 15

Enmund v. Florida, 458 U.S. 782 (1982)....15, 17, 18, 19, 27

Furman v. Georgia, 408 U.S. 238 (1972).....24, 26

Godfrey v. Georgia, 446 U.S. 420 (1980).....21, 27

Gregg v. Georgia, 428 U.S. 153 (1976) 18

Lockett v. Ohio, 438 U.S. 586 (1978).....23, 24

Lowenfield v. Phelps, 484 U.S. 231 (1988) 14, 16

Maynard v. Cartwright, 486 U.S. 356 (1988)..... 15

McCleskey v. Kemp, 481 U.S. 279 (1987)..... 11

Michigan v. Long, 463 U.S. 1032 (1983)..... 3

Payne v. Tennessee, 501 U.S. ___, 111 S. Ct. 2597 (1991)..... 16

Proffitt v. Florida, 428 U.S. 242 (1976)..... 11

Pulley v. Harris, 465 U.S. 37 (1984)..... 24

Skipper v. South Carolina, 476 U.S. 1 (1986) 17, 20

State v. Branam, No. 03502-9103, 1993 WL 173632 (Tenn. May 24, 1993)..... 23

State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) 3, 14, 23, 25, 28

Sumner v. Shuman, 483 U.S. 66 (1987) 23

Tison v. Arizona, 481 U.S. 137 (1987)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Walton v. Arizona, 497 U.S. 639 (1990)..... 15, 16, 27

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 11

Zant v. Stephens, 462 U.S. 862 (1983) 11, 22, 24

STATUTES

TENN. CODE ANN. § 39-2-202(a) (1982).....2, 13

TENN. CODE ANN. § 39-2-203(i)(5) and (7) (1982) 2

TENN. CODE ANN. § 39-2-203(g) (1982)..... 2

TENN. CODE ANN. § 39-2-205(a) (1982)..... 2

TENN. CODE ANN. § 39-2-301 (1982) 2

TENN. CODE ANN. § 39-13-202(a) (1991)..... 12

TENN. CODE ANN. § 39-13-202(a)(2) (1991) 2, 13

TENN. CODE ANN. § 39-13-202(b) (1991)..... 12

TENN. CODE ANN. § 39-13-204(a) (1991)..... 22

TENN. CODE ANN. § 39-13-204(e) (1991)..... 22

TENN. CODE ANN. § 39-13-204(f) (1991) 22

TENN. CODE ANN. § 39-13-206 (1991) 22

OTHER AUTHORITIES

Model Penal Code § 2.02(1)(c) (Proposed Official Draft 1962)..... 17

Model Penal Code § 210.2(b) (Proposed Official Draft 1962)..... 19

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STATE OF TENNESSEE,

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DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF OF PETITIONER

STATEMENT OF THE CASE

A. Procedural History

Donald Ray Middlebrooks was indicted in September, 1987, by the Grand Jury for Davidson County, Tennessee, for the first-degree murder, aggravated kidnapping, armed robbery, and aggravated sexual battery of Kerrick Majors. (R. Vol. of Pleadings, 2-7). On September 19, 1989, Middlebrooks was found guilty of murder in the first degree in the perpetration of a felony, to wit, aggravated kidnapping. TENN. CODE ANN.

§ 39-2-202(a) (1982).[1] He was also found guilty of aggravated kidnapping. TENN. CODE ANN. § 32-2-301 (1982). (R. Vol. of Pleadings, 84). On September 22, 1989, after a sentencing hearing, the jury imposed the death penalty. The jury found that two aggravating circumstances were present: (1) that the murder was heinous, atrocious or cruel in that it involved torture or depravity of mind; and (2) that it was committed while the defendant was engaged in committing a felony. TENN. CODE ANN. § 39-2-203(i)(5) and (7) (1982). The jury further found, as required by the Tennessee statute, that the aggravating circumstances sufficiently outweighed the mitigating circumstances. TENN. CODE ANN. § 39-2-203(g) (1982). (R. Vol. of Pleadings, 94). The trial court sentenced Middlebrooks to 60 years for the aggravated kidnapping. (R. Vol. of Pleadings, 124).

On September 8, 1992, upon automatic, direct review under TENN. CODE ANN. § 39-2-205(a) (1982), the

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[1] TENN. CODE ANN. § 39-2-202(a) provided, at the time of Middlebrooks' conviction, in pertinent part, that a murder "committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb is murder in the first degree".

The Tennessee Legislature amended the statute in 1989 to require recklessness as an element of felony murder. TENN. CODE ANN. § 39-13-202(a)(2) (1991). The Supreme Court of Tennessee expressly stated that its decision would be exactly the same under the pre-1989 or post-1989 version of the statute. *See Middlebrooks*, App. to Cert. petition at A57. Thus, the question raised in this case is not mooted or otherwise rendered unimportant by the 1989 change in Tennessee's felony murder statute.

Supreme Court of Tennessee affirmed Middlebrooks' conviction but remanded the case for resentencing. A three-member majority of the court held that the "duplication" of the elements of felony murder required for the conviction and for application of the felony murder aggravating circumstance violated the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution because the statute as applied in this manner did not sufficiently narrow the class of death-eligible defendants.[2] *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992). The State of Tennessee filed a petition for the writ of certiorari on December 7, 1992. This Court granted the writ on April 19, 1993.[3]

B. Trial and Sentencing

On Sunday, April 26, 1987, around 7:00 p.m., 14-year-old Kerrick Majors, a small boy weighing less than 100 pounds, was with friends in Nashville, Tennessee, when

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[2] While the opinion cites both the federal and state constitutions, this Court has jurisdiction to entertain this matter since it is impossible to conclude that the lower court's decision rested on an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032 (1983). As noted in the petition for certiorari, the opinion relies heavily on the Tennessee Supreme Court's interpretation of this Court's decisions and lacks a plain statement that the result is compelled by state law. *See Middlebrooks*, cert. petition at 13-16. Indeed, it is clear that the Tennessee Supreme Court's holding in this case was compelled by its erroneous interpretation of the Eighth Amendment.

[3] The petition filed by the State was a consolidated petition which also asked the Court to grant certiorari in *Tennessee v. Jonathan Vaughn Evans*. The grant of certiorari was limited to respondent Middlebrooks, however.

they noticed a flea market which had been set up by three homeless persons: Middlebrooks, his wife and Roger Brewington. As the boys approached the flea market, Tammy Middlebrooks called out, "Hey, leave our stuff alone!" The boys started running, chased by Middlebrooks and Brewington. The two men caught Kerrick, and his friends watched as he was dragged into a wooded area. (R. IX, 1320-1325, 1340-1352; X, 1425-1445; XI, 1502).

According to a statement given by Middlebrooks,[4] after they caught the child, he was dragged into a wooded area and the beating and torture began. Brewington slapped the victim, beat him with brass knuckles, hit him with a stick and urinated in his mouth. If the boy flinched, he would be hit again. Middlebrooks and Brewington tied the boy with a rope. Middlebrooks told the child to "be still" because "the dude's going to break your toe". Kerrick pleaded to be let go and said, "All I want to do is go to school and get an education." Brewington responded with profanity. Middlebrooks admitted striking the boy with his open hand and with a switch. Middlebrooks maintained that his wife slapped Kerrick and burned the child's nose with a cigarette lighter. Brewington hit Kerrick on his testicles and threatened to cut "it" open, rammed a stick up the victim's anus, beat the victim and slashed his wrists. Kerrick's eye was bleeding and Brewington would dip a stick in the blood and wipe it on his own head. Brewington also

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[4] The videotape of Middlebrooks' confession was admitted into evidence as Exhibit No. 20 and is included in the appellate record.

licked the victim's bleeding wrist. (R. XI, 1537-1549, 1559-1560).

The beating resulted in numerous abrasions, swellings and bruising on the victim's head, eye, nose, lips and inside his mouth. Kerrick also suffered bruises and skinned areas on his back and had an "X" with a vertical line running through it carved on his chest. These superficial incisions were made while Kerrick was alive. (R. X, 1477-1479; XI, 1641-1642).

Middlebrooks and Brewington, who are white, also repeatedly hurled racial slurs at Kerrick, who was black. Middlebrooks maintained that he told Brewington to "do it" if he was going to do it because the child's crying and begging were getting on his [Middlebrooks's] nerves. Brewington then kissed Kerrick on the forehead, calling it the "kiss of death". Brewington gave Middlebrooks the knife and told him to stab Kerrick. In his confession, Middlebrooks maintained that Brewington stabbed the victim first and that he then got the knife from Brewington and stabbed the child to "prove to Roger that I guess I was cooler" and to put the victim out of his misery. However, Middlebrooks told the arresting officer that he, and not Brewington, stabbed Kerrick both times. (R. XI, 1546-1554, 1522-1528, 1572-1573).

When Kerrick's body was found the next day, there were two deep stab wounds in the center of his body, one of which caused him to bleed to death. He would have lived for a period of ten to twenty minutes after these wounds were inflicted and he would have been conscious for a portion of that time. A blood-stained tee shirt was tied around his neck and there was a belt around his

wrists. The shirt, which had been used as a gag, was wet and smelled strongly of urine. A stick with blood on one end was found lying close to the boy's head. (R. X, 1458-1489; XI, 1638-XII, 1652). The police located the murder weapon, a large locked-blade knife fashioned like a brass knuckle, with blood on the blade. (R. XI, 1505-1508).

The police found and arrested Roger Brewington, who was 16 years old. Brewington implicated Middlebrooks and Middlebrooks's wife, Tammy, in the murder. (R. XI, 150-1512). Middlebrooks was eventually arrested. At the police station, he gave a lengthy videotaped confession. (R. XI, 1510-1522). Although Middlebrooks claimed that he was afraid of Brewington, although he admitted that he never attempted to leave even when he had the knife in his possession. Further, he willingly met Brewington the day after the murder so Brewington could invite him to do what they had done to Kerrick to an entire family. Middlebrooks maintains he declined the offer. (R. XI, 1556-1577).

The victim's ordeal of torture began with his kidnapping at 7:30 p.m. and ended with his death at 11:00 p.m. As the videotape of his confession demonstrates, Middlebrooks demonstrated a cavalier attitude and often smirked while recounting the details of the torture and murder. (R. Ex. 20).

At the sentencing phase of the trial, the State incorporated the evidence adduced at trial and introduced additional evidence regarding Kerrick's injuries, including photographs of his body to establish the extent of torture inflicted on him. (R. XIII, 1803-1819). In an attempt to mitigate his crime, Middlebrooks presented

proof that his father died when he was four years old, that his mother was not home much, and that he "changed" after being raped by a cousin at age eight. He further presented proof that he had been in psychiatric hospitals. (R. XIII, 1827-1946). A clinical psychiatrist testified that Middlebrooks has a borderline personality disorder and that he also suffers from depression, poly-substance abuse, anti-social personality, seizures and malingering, meaning that he has intentionally fabricated or exaggerated symptoms. (R. XIII, 1941-XIV, 1961; XIV, 1968-XV, 2103).

SUMMARY OF ARGUMENT

The sole issue presented in this case is whether Tennessee's statutory felony murder aggravating circumstance satisfies Eighth Amendment requirements by guiding and regularizing the capital sentencer's discretion in selecting murderers on whom the death penalty may be imposed.

The Tennessee Supreme Court erroneously concluded that the felony murder aggravating circumstance fails to perform this constitutional narrowing function. This holding was based on two separate errors in applying the Eighth Amendment narrowing requirement: (1) the court erroneously interpreted the Eighth Amendment to require the aggravator to further narrow a class of murderers that had already been sufficiently identified as being subject to a sentence of death, and (2) the court wrongly insisted that, in the particular context of felony

murder cases, the felony murder aggravating circumstance narrow the class by requiring a mens rea in addition to existing Eighth Amendment proportionality limitations.

The lower court's failure to apply the narrowing requirement to the appropriate class occurred, first, because it failed to address the proper constitutional question under this Court's cases: whether the felony murder aggravating circumstance sufficiently guides the sentencer in narrowing the class of *all death-eligible murderers* (which, in Tennessee is all death-eligible first degree murderers) to that sub-class of murderers for whom the death penalty is particularly appropriate.

If the court had addressed this question, it would have seen that, as applied to the class of all death-eligible *first degree murderers* in Tennessee (a large and diverse class that includes both premeditated "intent" murderers as well as exceptionally heightened culpability felony murderers), the felony murder aggravating circumstance identifies an appropriate sub-class of murderers for whom a sentence of death is constitutionally appropriate.

This Court has already held that the narrowing function need not be performed at the sentencing phase of the trial but may instead be performed at the guilt stage or after trial by a state appellate court (pursuant to a non-vague criterion). Thus, it is totally irrelevant, for constitutional purposes, when and where in a state's overall capital punishment system the constitutional narrowing requirement is satisfied.

Moreover, the sentencer's discretion is guided in a principled and rational manner. The Tennessee legislature

is certainly entitled to conclude that those who commit murder during the course of a serious felony are particularly appropriate for imposition of the death penalty for three reasons: (1) Because they cause more harm to society than non-felony murderers; (2) Because they can be deterred from creating an extreme risk of death to victims by their commission of serious felonies; and (3) Because they often exhibit even greater moral culpability than the average murderer who kills with premeditation, but not in the course of a felony.

The Tennessee Supreme Court also erred by holding that the felony murder aggravating circumstance must narrow the class of felony murderers based upon a higher level of mens rea than that required by Eighth Amendment proportionality standards. This rationale fails to recognize that the narrowing requirement is not an end in and of itself, but has as its purpose the guiding of the jury's discretion in order to ensure rationality, predictability, and particularization in capital sentencing. It is the Legislature's duty to adopt objective standards to inform the capital sentencer and reviewing court of the basis for imposing the death penalty in a particular case. Such a legislative decision is accorded special deference by the Eighth Amendment in the jurisdiction of this Court. To require anything more from a state which has employed proper narrowing procedures with principled criteria for the capital sentencer to follow, results in a novel and unjustifiable Eighth Amendment intrusion into a state's legislative decision.

Tennessee's felony murder aggravating circumstance, as it operates within the context of Tennessee's capital punishment system as a whole, leads to the imposition of the death penalty in a principled and rational manner.

The only persons who can possibly receive the death penalty in Tennessee by means of a felony murder aggravating circumstance are those who exhibit the culpability of a murderer and whose murderous act occurs during the course of an enumerated felony. The end result that is the sole purpose of the narrowing requirement – principled, rational, and particularized death sentencing – is achieved. Nothing more is, or should be, constitutionally required.

Finally, Tennessee's felony murder aggravating circumstance does not violate any other Eighth Amendment requirement since there is no proportionality or vagueness problem presented. The felony murder aggravating circumstance in Tennessee, as applied since this Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987), complies with this Court's proportionality requirement. Additionally, the aggravating circumstance is clear and unambiguous and thus can pose no vagueness problem.

ARGUMENT

THE EIGHTH AMENDMENT IS NOT VIOLATED WHERE THE SENTENCER IN A CAPITAL FELONY MURDER CASE RELIES ON A STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN THE PERPETRATION OF A FELONY.

A. Tennessee's felony murder aggravating circumstance is a principled criterion which guides the sentencer's discretion in deciding whether the death penalty should be imposed in a particular case.

The sole issue presented in this case is whether Tennessee's felony murder aggravating circumstance sufficiently "guides," "regularizes" and makes "rationally

reviewable" the jury's discretion in narrowing in a principled manner the class of murderers to a sub-class of those who may have the death penalty imposed upon them. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). The Eighth Amendment requires that an aggravating circumstance serve to ensure that the sentencer's discretion is guided and channeled in order to eliminate "total arbitrariness and capriciousness" in the imposition of a capital sentence. *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). In *McCleskey v. Kemp*, 481 U.S. 279 (1987), this Court explained what a state's death penalty scheme must accomplish in order to satisfy the Eighth Amendment requirement of narrowing:

> [O]ur decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.

Id. at 305. Consequently, an aggravating circumstance must serve to "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

1. The felony murder aggravating circumstance sufficiently narrows the class of murderers.

There can be no question that the Tennessee felony murder aggravating circumstance adequately narrows the

class of murderers who are eligible for the death penalty (in Tennessee, all first degree murderers) into a smaller subset. The Supreme Court of Tennessee mistakenly concluded otherwise, in part, because it employed as its universe of all murders only felony murders. The court reasoned that since the universe of all murders was felony murders, the aggravating circumstance did nothing to further narrow the class of death-eligible defendants from all defendants who commit felony murder because there were no elements in the aggravating circumstance that were not also present as an element of the offense. This is incorrect for two reasons. First, felony murder is just one means by which the State may prove that an individual has committed murder in the first degree and is potentially eligible for the death penalty. A killing which is "intentional, premeditated and deliberate" or a reckless killing which is the result of discharging an explosive device also constitutes first-degree murder, TENN. CODE ANN. § 39-13-202(a) (1991), and all first degree murders are potentially eligible for the death penalty. TENN. CODE ANN. § 39-13-202(b) (1991). Thus, the universe of death-eligible killers includes not just felony murderers but those who intentionally, premeditatedly and deliberately kill.

Recently, this Court held that "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty the circumstance is constitutionally infirm." *Arave v. Creech*, 507 U.S. at ___, 113 S. Ct. 1534, 1542 (1993) (emphasis in the original). In that case, this Court upheld an aggravating circumstance which, together with the state court's limiting construction, required that the murder was "cold

blooded and pitiless". The Court concluded that this aggravating circumstance adequately narrowed the class of death-eligible defendants since some murderers exhibit "feeling" and are not "cold blooded". Thus, the statute "narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Arave*, 507 U.S. at ___, 113 S. Ct. at 1543. Surely, if the Idaho aggravating circumstance meets the Eighth Amendment narrowing requirement since there are at least some murderers to whom it does not apply, the felony murder aggravating circumstance also complies since there are a substantial number of first degree murderers for whom the felony murder aggravator is inapplicable.

Second, since *Tison*, the Tennessee felony murder aggravating circumstance cannot be used to impose the death penalty even against *all* felony murderers, but *only* against the limited category of felony murderers who are major participants in the crime and act with reckless indifference to the value of human life.[5] Quite clearly, felony murders with such heightened culpability are a subset of all felony murders. For this reason, the aggravating circumstance can be used to impose the death penalty only when the defendant exhibits a mens rea level not present as an element of the crime of felony murder.

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[5] Under the first-degree murder statute at the time Middlebrooks committed his crime, felony murder did not include any heightened mens rea requirement. TENN. CODE ANN. § 39-2-202(a) (1982), and thus the *Tison* standard would have been applied by the Tennessee courts. A 1991 amendment to the first-degree murder statute added "recklessness" as an element of felony murder. TENN. CODE ANN. § 39-13-202(a)(2).

Thus, the felony murder aggravating circumstance substantially narrows the class from the properly defined universe of all murderers, including all traditional "intent" murderers as well as all felony murderers who do not meet the *Tison* standard.

It is important to note that this case does *not* pose any constitutional problem relating to the timing or mechanics of the narrowing process. Even the Supreme Court of Tennessee in its opinion seemed to acknowledge that the timing and mechanics of the narrowing process were constitutionally insignificant; rather, the court's decision was premised on its mistaken belief that Tennessee's use of the felony murder aggravator, in a felony murder case, simply could not adequately perform the required narrowing function. *Middlebrooks*, App. to cert. petition at A62.

In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the petitioner complained that his death sentence should be set aside because the sole aggravating circumstance was identical to an element of the crime for which he was convicted. The Court found that the petitioner's argument "that the parallel nature of these provisions requires that his sentence be set aside rests on a mistaken premise as to the necessary role of aggravating circumstances." *Id.* at 244. The Court again emphasized that to comply with the Eighth Amendment, a capital sentencing scheme must narrow the class of persons eligible for the death penalty and that aggravating factors are one method to accomplish this narrowing. It does not matter whether the narrowing occurs in the guilt phase, as it did under the Louisiana sentencing scheme involved in *Lowenfield*, or whether it occurs at the sentencing phase.

Similarly, in *Walton v. Arizona*, 497 U.S. 639 (1990), the petitioner argued, *inter alia*, that Arizona's interpretation of the "especially heinous, cruel or depraved" aggravating circumstance failed to adequately channel the sentencer's discretion. This Court explained that trial judges (who are responsible for Arizona death sentencing) can be presumed to follow any non-vague narrowing construction that has been declared by the Arizona Supreme Court. The Court added, however, that:

> [E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, . . . a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined . . .

Id. at 653-4. In other words, the *Walton* court held that any non-vague narrowing criteria, such as an aggravating circumstance, can be applied by a state appellate court and satisfy the Eighth Amendment. *Compare Maynard v. Cartwright*, 486 U.S. 356 (1988) (appellate court cannot perform narrowing function pursuant to a vague aggravating circumstance.) This is consistent with this Court's Eighth Amendment proportionality cases. *See Tison*, 481 U.S. at 143-5 (application of *Tison* felony murder culpability standard can be based on facts found by state appellate court); *Cabana v. Bullock*, 474 U.S. 376, 392 (1986) (state appellate court can properly decide whether the *Enmund v. Florida*, 458 U.S. 782 (1982), felony murder culpability standard is met).

Thus, under *Lowenfield* and *Walton*, the narrowing function required by the Eighth Amendment in death penalty cases may properly be performed by a jury, a trial judge, or an appellate court, so long as the narrowing criteria is not unconstitutionally vague. In light of this Court's rulings in *Lowenfield* and *Walton*, it is not surprising that the Supreme Court of Tennessee's opinion did not focus on the particular timing or mechanics of the narrowing function. Such purely procedural or technical matters are constitutionally insignificant so long as the required narrowing takes place at some point. Rather, the decision of the lower court was premised upon its mistaken belief that Tennessee's use of the felony murder aggravating circumstance, in a felony murder case, simply could not adequately perform the required narrowing function.

2. The felony murder aggravating circumstance narrows the class of murderers in a principled manner.

The felony murder aggravator serves to identify a class of murderers for whom imposition of the death penalty is a principled legislative choice for three reasons. First, a defendant who not only murders but in addition commits another serious felony has caused greater harm to society than an individual who murders but commits no additional crime. Courts have always taken into consideration the harm caused by the defendant in imposing sentence. It is entirely legitimate for Tennessee to permit the jury to consider all of the harm caused by the defendant in assessing his personal responsibility. *Payne v. Tennessee*, 501 U.S. ___, 111 S.Ct. 2597 (1991). The commission of a statutorily designated felony

in addition to the murder creates additional harm to society and it is therefore a principled penological decision to address this concern in the form of a felony murder aggravating circumstance.

Second, society has a legitimate need to deter the commission of particularly reckless felonies which may result in murder. The felony murder aggravating circumstance serves this purpose. "[This Court has] recognized that society has important and legitimate interests in retribution *and deterrence*, and that these interests provide the necessary justification for imposing the death penalty." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (emphasis added).

Although this Court in *Enmund* found that the death penalty could not deter murder in the felony murder context because no premeditation or deliberation takes place with respect to the killing, *Enmund*, 458 U.S. at 799, that concern clearly pre-dates *Tison*. As a result of the decision in *Tison*, a felony murder defendant may not receive the death penalty unless he was a major participant in the underlying felony and acted with reckless indifference to the value of human life. In order to meet the *Tison* recklessness test, the defendant must act with conscious awareness that his actions create an extreme threat to human life; merely negligent creation of risk of death will not suffice.[6] Such a person must make a

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[6] Section 2.02 of the Model Penal Code defines recklessness as when an individual "consciously disregards a substantial and unjustifiable risk that the material element [of the offense] exists or will result from his conduct. . . . " MODEL PENAL CODE § 202(1)(c) (Proposed Official Draft 1962).

conscious, intentional decision to commit the underlying felony despite the known risk to human life.

It is perfectly reasonable for the Tennessee Legislature to conclude that the death penalty will have a similar deterrent effect on post-*Tison* felony murderers as it does on traditional intent murderers. Under *Tison*, the threat of the death penalty may well deter such persons from continuing in their reckless course of conduct or, at the very least, lead them to take special steps to prevent unintended killings. Thus, deterrence provides a principled legislative basis for the felony murder aggravating circumstance to which this Court should extend special deference since "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with legislatures. . . . " *Gregg v. Georgia*, 428 U.S. 153, 186-187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

Tennessee's felony murder aggravating circumstance also narrows the class of murderers based upon their personal responsibility and moral guilt. Under this Court's decisions in *Tison* and *Enmund*, only those murderers who killed, intended to kill or acted with reckless indifference to the possibility that the victim would in fact die, may receive the death penalty. In *Tison*, this Court noted that "the common law and modern criminal codes alike have classified [such behavior] along with intentional murders."[7] *Id.* at 157. Thus, the *Tison*

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[7] The *Tison* culpability standard of "reckless indifference to the value of human life" is for death penalty purposes the functional equivalent of what the Model Penal Code calls acting "recklessly under circumstances manifesting extreme indifference to the value of human life," MODEL PENAL CODE § 210.2(b)) and what many state murder statutes call "extreme recklessness" sufficient to impose murder liability, even in the absence of an accompanying felony. In fact, at least 34 states would treat at least some defendants who meet a *Tison*-type standard of heightened recklessness but who have not committed felony murder as "murderers". *See* Appendix.

culpability standard means that, in order to be constitutionally death-eligible, a felony murder defendant must at least approach, if not exceed, the personal moral culpability of traditional first degree murder with respect to the victim's death. This heightened level of culpability, *for the victim's death itself*, is a constitutionally significant factor that is analytically distinct from the fact that a felony murder defendant may also have committed an extremely serious felony. Although the Court noted in *Tison* that the commission of certain felonies may suffice, either categorically or in particular cases, as persuasive evidence of the existence of "reckless indifference to the value of human life," an individual felony murder defendant's personal guilt and moral culpability with respect to the victim's death nevertheless remains a separate constitutional requirement.

Thus, after *Enmund* and *Tison*, if an individual felony murder defendant does not possess heightened personal moral culpability for the victim's death at the level of at least "reckless indifference to the value of human life," then the death penalty is a disproportionate punishment that cannot be imposed on the defendant. Given this existing constitutional limitation on the imposition of the death penalty for all felony murder cases, the presence of the felony murder aggravator serves exactly the same

purpose in all post-*Tison* felony murder cases as it serves in traditional first degree murder cases. That is, the presence of the felony murder aggravating circumstance reflects the state's decision that the defendant is among those for whom death is an appropriate punishment because such a defendant *not only* exhibited a heightened personal moral culpability with respect to the victim's death (either "premeditated intent to kill" for traditional first degree murder, or "reckless indifference to the value of human life," for post-*Tison* felony murders), *but also* possessed that heightened culpability in connection with the intentional commission of an extremely serious felony.

The fact that a murderer has committed a serious felony in addition to the murder suggests that he has not acted in an aberrational way in committing murder; thus, imposition of the death penalty is particularly appropriate. This Court has said that a defendant's past criminal conduct is "indicative of his probable future behavior". *Skipper*, 476 U.S. at 5. This common sense proposition is true precisely because a person who commits a criminal offense is likely to commit another. Similarly, the commission of a serious felony in addition to murder is indicative of the character of the defendant.

Indeed, in many cases the commission of an intentional, serious felony coupled with heightened recklessness with respect to the death of the victim, represents greater moral culpability than even premeditated intentional murder. An individual who commits premeditated murder, though criminally culpable, may well have been responding emotionally or acting in the heat of anger, even if there was insufficient provocation to make the

crime manslaughter. For example, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), the defendant killed with intent and premeditation as a result of a domestic dispute. This Court was unable to find Godfrey's crime, though premeditated, to be any more serious than other murders.

On the other hand, a person who not only commits murder but, for example, intentionally steals money from his victim or intentionally rapes before killing displays greater moral depravity, deserving of the ultimate punishment. As this Court recognized in *Tison*:

> A narrow focus on the question of whether or not a given defendant "intended to kill", however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all – those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty – those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of a robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as "intent to kill".

Tison, 481 U.S. at 157.

Thus, creating an aggravating circumstance based on the commission of an additional felony is a perfectly principled legislative choice that is consistent with the defendant's culpability.

B. Tennessee's capital sentencing scheme as a whole ensures compliance with the Eighth Amendment.

The Supreme Court of Tennessee erred in looking only at the single aggravating circumstance of felony murder in determining whether there was sufficient narrowing to satisfy the federal constitution. Aggravating factors are but one portion of the sentencing scheme. The system must be examined as a whole when evaluating whether it is constitutionally adequate. Tennessee's statute includes several other safeguards which help to channel the sentencer's discretion. A bifurcated proceeding is mandated, as is appellate review. TENN. CODE ANN. §§ 39-13-204(a); 39-13-206 (1991). In determining that Georgia's statutory scheme was constitutionally permissible, this Court found these two factors to be "important features . . . that would guide and channel the exercise of discretion." *Zant*, 462 U.S. at 875. Additionally, Tennessee's statute requires that the jury consider mitigating circumstances and specifically directs the way in which the jury is to weigh the aggravating factors and the mitigating factors. TENN. CODE ANN. § 39-13-204(e) and (f) (1991). All of these statutory safeguards work together to ensure that the jury is not given unfettered discretion but rather that its discretion is adequately channeled in the selection phase.

The Supreme Court of Tennessee clearly appreciates and fulfills its statutory duty to conduct a proportionality review on the death penalty cases which come before it. In this case, the Supreme Court of Tennessee indicated quite emphatically that the court would continue to conduct a proportionality review in capital cases "to assure that the sentence *in each case* is not disproportionate or excessive." *Middlebrooks*, App. to cert. petition at A45; (emphasis in original).[8]

Under any capital sentencing scheme, one might be able to imagine a hypothetical fact pattern which, while falling under the purview of a particular aggravating circumstance, would not necessarily identify a defendant who deserves the death penalty more than other murderers. However, that would not render such a capital sentencing scheme unconstitutional. Indeed, it is precisely for this reason that this Court has insisted on individualized mitigating circumstances. *Sumner v. Shuman*, 483 U.S. 66 (1987); *Lockett v. Ohio*, 438 U.S. 586 (1978). Rather, the question is whether the sentencing scheme *as a whole* ensures that the imposition of the death penalty is not wanton and freakish and that there is a reasonable basis for imposing the death penalty on those defendants who receive it as compared to those death-eligible defendants who receive a sentence of life

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[8] That the Supreme Court of Tennessee fulfills its statutory duty to review the proportionality of death sentences was recently demonstrated by its decision to set aside a sentence of death in a felony murder case based, in part, upon a finding that the *Tison* "heightened recklessness" standard had not been met. *State v. Branam*, No. 03502-9103, 1993 WL 173632 (Tenn. May 24, 1993).

imprisonment. Similarly, an aggravating circumstance which is facially valid and meets all constitutional requirements will not be invalidated simply because it may have been improperly applied in an isolated, individual case. *Arave*, 507 U.S. at ___, 113 S. Ct. at 1544 (1993). As this Court said in *Pulley v. Harris*, 465 U.S. 37, 54 (1984):

> Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systematic defects identified in *Furman*. As we have acknowledged in the past, "there can be no 'perfect procedure for deciding in which cases governmental authority should be used to impose death.' " *Zant v. Stephens*, 462 U.S. at 884, 103 S.Ct. at 2747-2748, *quoting Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion).

The death penalty in this case was imposed by a jury which fully considered the nature and circumstances of the crime, the aggravating circumstances, and the proof which Middlebrooks offered in mitigation. There can be no question that death is a proportional punishment for the crime Middlebrooks committed and that imposition of the death penalty in accordance with Tennessee's statutory scheme was neither "wanton" nor "freakish". *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

C. This case does not present an issue of proportionality because the use of the felony murder aggravating circumstance does not violate the Eighth Amendment proportionality requirement.

No proportionality problem is presented in this case because the felony murder aggravating circumstance as applied in Tennessee since this Court's decision in *Tison* fully meets Eighth Amendment proportionality requirements. As the Court recognized in *Tison*, "substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of intent to kill powerfully suggests that our society does *not* reject the death penalty as grossly excessive under the circumstances." *Tison*, 481 U.S. at 154 (citations omitted) (emphasis in the original). This Court concluded that the death penalty was a proportional punishment for felony murderers so long as the defendant was a "major participant" in the underlying felony and exhibited with respect to the killing at least "reckless indifference to the value of human life". *Id.* at 158.

Tennessee's statute meets this constitutional mandate whether or not a felony murder aggravating circumstance is employed. The Supreme Court of Tennessee correctly found that the State's statutory scheme complies with the proportionality standard for felony murder set out in *Tison*. However, rather than concluding that, as a result, Tennessee's statute necessarily meets the proportionality requirement as defined in that case, the court instead erroneously concluded that the class had to be further "narrowed" into an even smaller subset based on the defendant's mens rea; and, since this was not done, the court found that the statutory scheme failed to satisfy the Eighth Amendment's requirements. *Middlebrooks*, App. to

cert. petition at A59. This conclusion is in error since, once the *Tison* standard is met, the Eighth Amendment's proportionality mandate has been fully satisfied and the question then becomes whether the aggravating circumstance sufficiently narrows the class of murderers in a principled manner. *See* argument A, *supra*.

Finally, Middlebrooks never claimed in state court that death was a disproportionate punishment for the crime he committed. The failure to make such a claim is understandable given the evidence in this case. Middlebrooks confessed that he was present as 14-year-old Kerrick Majors was tortured over a three and one-half hour period, that he slapped the child and hit him with a "switch," that he watched as his partner in crime brutally beat the child and tortured him, that he told his partner to "do it", meaning "kill the boy," because the child's begging was getting on Middlebrooks' nerves, and finally that he administered at least one of the fatal stab wounds (and perhaps both) to prove that he was "cooler" than his partner. Obviously, no reasonable person can contend that a sentence of death is disproportionate for Middlebrooks' crime.

D. This case does not present a "vagueness" problem because the felony murder aggravating circumstance is clear and unambiguous.

In *Furman*, this Court held that for a capital sentencing scheme to be constitutional, the sentencer's discretion must be directed, limited and exercised in an informed matter so as to avoid the arbitrary and capricious imposition of the death penalty. To satisfy this requirement, the statute must "channel the sentencer's discretion by 'clear

and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey*, 446 U.S. at 428 (footnote omitted). Thus, a federal court when reviewing the constitutionality of an aggravator must first determine if it is "too vague to provide any guidance to the sentencer." *Walton*, 497 U.S. at 654.

Clearly, an aggravating circumstance which requires that the murder have been committed during the course of an enumerated felony is not vague. The jury is unambiguously informed that the circumstance may be found if a murder was committed during the course of a specifically enumerated felony. Such a well-defined aggravator adequately channels the sentencer's discretion. Thus, this aggravator fully satisfies this constitutional requirement and vagueness is not an issue presented in this case.

E. This Court should reject the creation of a new Eighth Amendment requirement.

Tennessee's use of the felony murder aggravating circumstance in the context of this Court's decisions in *Enmund* and *Tison* fully complies with each and every requirement under the Eighth Amendment that has been mandated by this Court. It is not vague, it does not result in the imposition of the death penalty where such a result would be disproportionate for the offense, and it meaningfully narrows the class of death-eligible defendants in a principled manner.

The Supreme Court of Tennessee created a novel requirement that the felony murder aggravating circumstance further narrow the set of all felony murderers who

meet the *Tison* proportionality standard into an even smaller subset of felony murderers on the basis of a heightened mens rea. The lower court's conclusion that "[s]ince the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants," (*Middlebrooks*, App. to cert. petition at A63), not only confuses the separate and distinct requirements of narrowing and proportionality but, if adopted, would do substantial harm to Eighth Amendment jurisprudence. The lower court's rationale could apply equally to other aggravating circumstances. Under the court's reasoning, whenever this Court decides to recognize a new minimum standard for proportional punishment under the Eighth Amendment, states that already comply with that proportionality standard must then amend their statutes and further narrow the class into an even smaller subset in order to "meaningfully further narrow the class of death-eligible defendants".

Such a requirement is unnecessary because the current guidelines set out by this Court are adequate to ensure that the death penalty is imposed in a constitutional manner. Further, such a requirement would produce a never-ending spiral of "narrowing" until imposition of the death penalty would be virtually impossible.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be reversed.

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APPENDIX

The following states permit convictions for at least some types of murder based upon extreme recklessness or something akin to it:

STATE	CODE SECTION
Alabama	ALA. CODE § 13A-6-2(a)(2) (1982)
Alaska	ALASKA STAT. § 11.41.110(a)(2) (1989) (1992 Supp.)
Arizona	ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (1989)
Arkansas	ARK. CODE ANN. § 5-10-101(a)(9) (Michie 1987) (1991 Supp.)
California	CAL. PENAL CODE § 188; 189 (West 1988) (1993 Supp.)
Colorado	COLO. REV. STAT. § 18-3-102(1)(d) (1986)
Delaware	DEL. CODE ANN. tit. 11, § 635(1) (1987) (1992 Supp.)
Florida	FLA. STAT. ANN. § 782.04(2) (West 1992)
Georgia	GA. CODE ANN. § 16-5-1(b) (Michie 1992)
Idaho	IDAHO CODE § 18-4001; 4002 (1987)
Illinois	ILL. ANN. STAT. ch. 38, ¶ 9-1(2) (Smith-Hurd 1979) (1992 Supp.)
Kansas	KAN. STAT. ANN. § 21-3402 (1988) (effective July 1, 1993) (1993 Kan. Sess. Laws 423)

Kentucky	KY. REV. STAT. ANN. § 507.020(1)(b) (Michie 1990)
Maine	ME. REV. STAT. ANN. tit. 17-A, § 201(1)(B) (West 1983)
Maryland	MD. CRIMES AND PUNISHMENTS CODE ANN. § 411 (1992)
Massachusetts	MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990)
Michigan	MICH. COMP. LAWS ANN. § 750.317 (West 1991)
Minnesota	MINN. STAT. ANN. § 609.195(a) (West 1987) (1993 Supp.)
Mississippi	MISS. CODE ANN. § 97-3-19(1)(b) (1973)
Nevada	NEV. REV. STAT. § 200.030(2); 200.020(2) (1991)
New Hampshire	N.H. REV. STAT. ANN. § 630:1-b (1986)
New Mexico	N.M. STAT. ANN. § 30-2-1(A)(3) (Michie 1991)
New York	N.Y. PENAL LAW § 125.25(2) (McKinney 1987)
North Carolina	N.C. GEN. STAT. § 14-17 (1991)
North Dakota	N.D. CENT. CODE § 12.1-16-01(1)(b) (1985)
Oklahoma	OKLA. STAT. ANN. tit. 21, § 701.8 (West 1983)
Pennsylvania	18 PA. CONS. STAT. ANN. § 2502 (1983)
Rhode Island	R.I. GEN. LAWS § 11-23-1 (1981) (1992 Supp.)

South Carolina	S.C. CODE ANN. § 16-3-10 (Law. Co-op 1985)
Tennessee	TENN. CODE ANN. § 39-13-210(2) (1991)
Utah	UTAH CODE ANN. § 76-5-202 & 203 (1990) (1992 Supp.)
Washington	WASH. REV. CODE § 9A 32.030(1)(b) (West 1988) (1993 Supp.)
West Virginia	W. VA. CODE § 61-2-1 (1992)
Wisconsin	WIS. STAT. ANN. § 940.02 (West 1982) (1992 Supp.)

Supreme Court, U.S.
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No. 92-989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TENNESSEE,
Petitioner,

v.

DONALD RAY MIDDLEBROOKS,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction under Article III of the United States Constitution and 28 U.S.C. § 1257 to review the judgment of the Tennessee Supreme Court below or does the judgment rest upon an adequate and independent state ground?

2. Did Tennessee's former sentencing scheme rationally narrow the class of persons exposed to a death sentence when it (a) used the broadest conceivable definition of first-degree murder, (b) made all persons convicted of first-degree murder death eligible, and (c) made death the presumptive sentence for all felony murderers (but not premeditated murderers) without requiring proof of a single element in aggravation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1
A. Factual Background	1
B. The Trial of Donald Ray Middlebrooks	3
C. Direct Appeal	8
SUMMARY OF THE ARGUMENT	13
ARGUMENT	15
I. THE JUDGMENT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND AND THIS COURT THEREFORE LACKS JURISDICTION TO REVIEW THE JUDGMENT BELOW	15
A. This Court Lacks Jurisdiction To Review a State Court Judgment Which Rests on an Adequate and Independent State Law Ground of Decision	16
B. The Judgment of the Tennessee Supreme Court Rests Upon Article I, § 16 of the Tennessee Constitution, Which Is an Adequate and Independent State Ground of Decision	20
II. TENNESSEE FAILED TO "GENUINELY NARROW" THE CLASS OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY THROUGH THE FELONY-MURDER AGGRAVATING CIRCUMSTANCE	27

TABLE OF CONTENTS—Continued

	Page
A. Tennessee Law of First-Degree Murder and the Operation of the Tennessee Capital Sentencing Scheme	28
B. The Class of Persons Eligible for the Death Penalty Was Not "Genuinely Narrowed"	32
1. The Eighth and Fourteenth Amendments Require "Genuine Narrowing"	32
2. The Tennessee Death Sentencing Scheme Did Not "Genuinely Narrow"	35
CONCLUSION	50
APPENDIX	1a

TABLE OF AUTHORITIES

CASES

	Page
Ake v. Oklahoma, 470 U.S. 68 (1985)	18, 19
Arave v. Creech, 507 U.S. ——, 113 S. Ct. 1534 (1993)	*passim*
Asarco v. Kadish, 490 U.S. 605 (1989)	26
Barclay v. Florida, 463 U.S. 939 (1983)	33, 45
Bass v. State, 231 S.W.2d 707 (Tenn. 1951)	29
Bell v. Maryland, 378 U.S. 226 (1964)	17
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	17
Blystone v. Pennsylvania, 494 U.S. 299 (1990)	45
Boyde v. California, 494 U.S. 370 (1990)	35
California ex rel. Cooper v. Mitchell Brothers Santa Ana Theater, 454 U.S. 90 (1981)	24
California v. Beheler, 463 U.S. 1121 (1983)	26
California v. Brown, 475 U.S. 1301 (1986)	24
California v. Freeman, 488 U.S. 1311 (1989)	18, 23
California v. Ramos, 463 U.S. 992 (1983)	26
Coleman v. Thompson, 501 U.S. ——, 111 S. Ct. 2546 (1991)	16, 17, 18, 19, 20, 22
Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985)	10, 13, 22, 26
Collins v. State, 550 S.W.2d 643 (Tenn. 1972)	29
Colorado v. Nunez, 465 U.S. 324 (1984)	16
Cramp v. Bd. of Public Instruction, 368 U.S. 278 (1961)	16
Delaware v. Prouse, 440 U.S. 648 (1979)	25
Delaware v. Van Arsdall, 475 U.S. 673 (1986)	24
Department of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965)	18
Douglas v. Alabama, 380 U.S. 415 (1965)	17
Dupes v. State, 209 Tenn. 506, 354 S.W.2d 453 (1962)	30
Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991)	11, 40
Engberg v. State, 686 P.2d 541 (Wyo. 1984)	11
Enmund v. Florida, 458 U.S. 782 (1982)	9, 45, 46
Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157 (1917)	19
Espinosa v. Florida, 505 U.S. ——, 112 S. Ct. 2926 (1992)	48
Farmer v. State, 296 S.W.2d 879 (Tenn. 1956)	29

TABLE OF AUTHORITIES—Continued

	Page
Fashnacht v. Frank, 23 Wall. (90 U.S.) 416 (1874)	17
Florida v. Casal, 462 U.S. 637 (1983)	27
Florida v. Riley, 488 U.S. 445 (1989)	25
Floyd v. State, 50 Tenn. 342 (1871)	29
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	16
Franklin v. Lynaugh, 487 U.S. 164 (1988)	21, 35
Furman v. Georgia, 408 U.S. 238 (1972)	14, 37, 42
Gardner v. Florida, 430 U.S. 349 (1977)	45
Godfrey v. Georgia, 446 U.S. 420 (1980)	33
Gregg v. Georgia, 428 U.S. 153 (1976)	9, 14
Harris v. Reed, 489 U.S. 255 (1989)	16, 20, 23, 25
Henry v. Mississippi, 379 U.S. 443 (1965)	17
Herb v. Pitcairn, 324 U.S. 117 (1945)	17
Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793 (1990)	25
Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938)	18
Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965)	16
Jurek v. Texas, 428 U.S. 262 (1976)	33, 35
Kentucky v. Stincer, 482 U.S. 730 (1987)	25
Lewis v. Jeffers, 497 U.S. 764 (1990)	33, 46
Lockhart v. Fretwell, 506 U.S. ——, 122 L. Ed. 2d 180 (1993)	22
Lowenfield v. Phelps, 484 U.S. 231 (1988)	*passim*
Maine v. Thornton, 466 U.S. 170 (1984)	26
Marks v. United States, 430 U.S. 188 (1977)	21
Maryland v. Garrison, 480 U.S. 79 (1987)	25
Maynard v. Cartwright, 486 U.S. 356 (1988)	46, 48
McCoy v. Shaw, 277 U.S. 302 (1928)	16
Michigan v. Chesternut, 486 U.S. 567 (1988)	25
Michigan v. Long, 463 U.S. 1032 (1983)	19, 22
Moody v. State, 46 Tenn. 299 (1869)	30
Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875)	19
New Jersey v. Portash, 440 U.S. 450 (1979)	25
New York v. Class, 475 U.S. 106 (1986)	26
New York v. Ferber, 458 U.S. 747 (1982)	36
New York v. P. J. Video, 475 U.S. 868 (1986)	26

TABLE OF AUTHORITIES—Continued

	Page
Ohio v. Huertas, 498 U.S. 336 (1991)	27
Ohio v. Johnson, 467 U.S. 493 (1984)	25
Oregon v. Kennedy, 456 U.S. 667 (1982)	26
Payne v. Tennessee, 501 U.S. ——, 111 S. Ct. 2597 (1991)	41
Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638 (1990)	25
Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934 (1989)	41, 44, 45
Proffitt v. Florida, 428 U.S. 242 (1976)	32
Pulley v. Harris, 465 U.S. 37 (1984)	33, 41
Quinn v. Millsap, 491 U.S. 95 (1989)	25
Radio Station WOW v. Johnson, 326 U.S. 120 (1945)	16
Red Cross Line v. Atlantic Fruit Company, 264 U.S. 109 (1924)	18
Schad v. Arizona, 501 U.S. ——, 111 S. Ct. 2491 (1991)	39, 42
Sochor v. Florida, 504 U.S. ——, 112 S. Ct. 2114 (1992)	16, 23, 46, 47, 48
South Dakota v. Neville, 459 U.S. 553 (1983)	26
Southwestern Bell Telephone Co. v. Oklahoma, 303 U.S. 206 (1938)	19, 23
Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969 (1989)	45
State v. Bane, —— S.W.2d ——, 1993 WL 126650 (Tenn. 1993)	29
State v. Barber, 753 S.W.2d 659 (Tenn. 1988)	29, 31
State v. Black, 815 S.W.2d 166 (Tenn. 1991)	9, 10, 20
State v. Brown, 756 S.W.2d 700 (Tenn. Crim. App. 1988)	30
State v. Brown, 836 S.W.2d 530 (Tenn. 1992)	29
State v. Cauthern, 778 S.W.2d 39 (Tenn. 1989)	29
State v. Cherry, 257 S.E.2d 551 (1979)	11, 13, 21, 26
State v. Hooper, 695 S.W.2d 530 (Tenn. Crim. App. 1985)	29, 30
State v. Johnson, 661 S.W.2d 854 (Tenn. 1983)	29
State v. McKay, 680 S.W.2d 447 (Tenn. 1984)	29
State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
State v. Moore, 614 S.W.2d 348 (Tenn. 1981)	47
State v. Norris, 684 U.S. 650 (Tenn. Crim. App. 1984)	29
State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981)	47
State v. West, 844 S.W.2d 144 (Tenn. 1992)	29
Stringer v. Black 503 U.S. ——, 112 S. Ct. 1130 (1992)	32, 35, 36, 43, 46, 48
Texas v. Brown, 460 U.S. 730 (1983)	25
Tison v. Arizona, 481 U.S. 137 (1987)	9, 45, 46
Tosh v. State, 527 S.W.2d 146 (Tenn. Crim. App. 1975)	29
Trop v. Dulles, 356 U.S. 86 (1958)	44
United Air Lines v. Mahin, 410 U.S. 623 (1973)	18
Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990)	33, 34, 46
Washington v. Chrisman, 455 U.S. 1 (1982)	24
Wisconsin v. Mitchell, 508 U.S. ——, 113 S. Ct. 2194 (1993)	42
Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843 (1932)	30
Woodson v. North Carolina, 428 U.S. 280 (1976)	34, 36
Xerox Corp. v. County of Harris, 459 U.S. 145 (1982)	18
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)	17, 18, 23, 24
Zant v. Stephens, 462 U.S. 862 (1983)	*passim*

CONSTITUTIONAL PROVISIONS

United States Constitution, Article III	13, 15, 16, 27
United States Constitution, Amendment VIII	*passim*
United States Constitution, Amendment XIV	32
Tennessee Constitution, Article I, § 16	*passim*

STATUTES AND RULES

28 U.S.C. § 1257	13, 15, 16, 17, 27
N.C. Gen. Stat. 17 (1975)	36
Tenn. Code Ann. § 39-1-103 (1982)	30
Tenn. Code Ann. § 39-2-202 (1982)	*passim*
Tenn. Code Ann. § 39-2-203 (1982)	4, 8, 14, 31, 43
Tenn. Code Ann. § 39-2-206 (1982)	30

TABLE OF AUTHORITIES—Continued

	Page
Tenn. Code Ann. § 39-2-301 (1982)	4
Tenn. Code Ann. § 39-2-501 (1982)	4
Tenn. Code Ann. § 39-2-606 (1982)	4
Tenn. Code Ann. § 39-13-202 (1989)	4, 29, 39
Tenn. Code Ann. § 39-13-204(g)(1) (1991)	31, 45
Tenn. Code Ann. § 39-2402 (1975)	28, 29, 39
Tenn. Code Ann. § 39-2402 (1955)	28, 37, 43
Tenn. Code Ann. § 40-35-111 (1982)	21, 49
Tenn. Code Ann. § 40-35-114 (1990)	21, 49
Tenn. R. Crim. P. 12.3	4
Tex. Pen. Code § 19.03 (1974)	37

MISCELLANEOUS

Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356, 366-369 (1978)	30
Laska, *The Tennessee State Constitution* (Greenwood Press: 1990)	11
Raybin, *New Death Penalty Statute Enacted for Tennessee*, Judicial Newsletter, Univ. of Tenn. College of Law (May, 1977)	28, 29
Rosen, *Felony Murder And The Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103 (1990)	11

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Constitutional and Statutory Provisions

A) Article III of the United States Constitution

B) The Eighth Amendment to the United States Constitution

C) The Fourteenth Amendment to the United States Constitution

D) 28 United States Code § 1257

E) Tennessee Constitution, Article I, § 16

F) Tenn. Code Ann. § 39-2-201 (Michie 1982)
Tenn. Code Ann. § 39-2-202 (Michie 1982)
Tenn. Code Ann. § 39-2-203 (Michie 1982)
Tenn. Code Ann. § 39-2-206 (Michie 1982)
Tenn. Code Ann. § 40-35-114 (Michie 1991)
Tenn. Code Ann. § 40-35-111 (Michie 1982)
Tenn. Code Ann. § 39-2402 (Michie 1975)
Tenn. Code Ann. § 39-2402 (Michie 1955)
Tenn. R. Crim. P. 12.3

The Constitutional Provisions and Statutes are reprinted in Appendix A.

JURISDICTIONAL STATEMENT

This Court does not have jurisdiction under Article III of the United States Constitution and 28 U.S.C. § 1257.

STATEMENT OF THE CASE

A. Factual Background

Donald Ray Middlebrooks has suffered mental illness throughout his life, having been in and out of various mental and psychiatric hospitals [1] (R. 1832, 1838, 1983). Donald's history of psychiatric problems started as a child, when he was sexually abused by his uncle (R. 1834-1838, 2062). As an adult, Donald has been diag-

[1] His father also suffered mental illness and had been institutionalized. (R. 1838).

nosed as psychotic, paranoid schizophrenic, and suffering borderline personality disorder, and has been treated with anti-psychotic drugs, including Thorazine, Haldol, and Mellaril (R. 1955, 1956, 1975, 2003-2004, 2005, 2009, 2014, 2017, 2061, 2071, 2074, 2076). Since his late teens, he has suffered grand mal seizures after being stabbed in the head with an icepick (R. 1843, 1847, 1897, 1974, 2015, 2018, 2030, 2054, 2075).

In August 1986, Donald was discharged from the Austin, Texas, State Hospital for the third time in several months, having been diagnosed with atypical psychosis and seizure disorder (R. 1844, 1899, 1932, 2005, 2008). He moved to Tennessee, where, in April 1987, he was homeless and living with his wife Tammy in a cardboard crate located in a wooded area of Nashville, Tennessee. Donald and Tammy eked out an existence by rummaging through garbage dumpsters and trying to sell anything of value at "flea markets" which they set up along roadways.

On April 26, 1987, Kerrick Majors and several of his young friends approached one such "flea market" set up by Donald, Tammy, and Roger Brewington, another homeless person, on Gallatin Road in Nashville (R. 1346). Majors and his friends apparently broke some items (R. 1540). Tammy yelled at them to get away (R. 1346, 1359, 1421-22). Donald and Roger Brewington chased them (R. 1540). As they were running away, Brewington grabbed Kerrick Majors and put him in a headlock (R. 1359, 1424). The two men, accompanied by Tammy, then dragged Majors into a nearby wooded area (R. 1364-1366).

While in the woods, Brewington began slapping Majors, hitting him with a knife with brass knuckles in the handle, and taunting him with racial epithets (R. 1542). Over the course of several hours, Brewington repeatedly assaulted and tortured Majors (R. 1543-1552, 1559, 1560). Middlebrooks repeatedly throughout his statement denied assaulting and torturing Majors except for slapping him once when they first grabbed him, pushing him back once, and hitting him on the leg with a switch (R. 1545-1547,

1558-1559, 1567). After watching the assault for some time, Middlebrooks told Brewington finally: "Man, you know, don't torture the dude, you know" (R. 1548). Middlebrooks realized that Brewington had gone too far and grabbed a stick for his own protection and told Brewington: ". . . we had best just leave the dude alone and go." (R. 1549). Middlebrooks and Brewington got into a fight over this (R. 1549). After the fight the assault continued, and Middlebrooks pleaded with Brewington: "Roger, —uh—if you will, man, do something, don't torture him, you know. I mean if you're going to do it, do it." (R. 1551). He begged Brewington to "quit putting the boy through hell . . ." (R. 1561). Middlebrooks was afraid to try to stop him because Brewington had a knife and he did not and he was afraid of Brewington (R. 1562-1563).

Brewington eventually stabbed Majors after trying to coax Middlebrooks to stab him (R. 1552). Middlebrooks then stabbed Majors out of fear that he would be stabbed by Brewington if he did not stab Majors (R. 1552-3). ("Because if I didn't stab him, I would have been beside him, probably. I don't know. I—I wouldn't have wanted to take no chance.") (R. 1572). Majors died from one of the stab wounds, although it was impossible to determine which was inflicted first (R. 1639, 1651). Majors' body was left in the woods where it was discovered the next day (R. 1450-1454).

B. The Trial of Donald Ray Middlebrooks

Donald Ray Middlebrooks was indicted for First Degree Murder in the death of Kerrick Majors, under both theories of First Degree Murder contained in Tenn. Code Ann. § 39-2-202,[2] viz. that he did: "unlawfully, feloni-

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[2] At the time this crime was committed, Tenn. Code Ann. § 39-2-202 stated:

(a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burg-

ously, willfully, deliberately, premeditatedly and maliciously *or* while in the perpetration of a felony, to-wit kidnapping or larceny, . . . kill and murder the said Kerrick Lamar Majors against the peace and dignity of the State." (emphasis added)[3] (J.A. 2).

Before trial, the State issued notice [4] that it intended to seek the death penalty, identifying two statutory aggravating circumstances contained in Tenn. Code Ann. § 39.2-203(i): "(1) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of

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lary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

Tenn. Code Ann. § 39-2-202 was amended in 1989. It now is Tenn. Code Ann. § 39-13-202 and reads:

(a) First degree murder is:

(1) An intentional, premeditated and deliberate killing of another; or

(2) A reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy;

(3) A reckless killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb; or

(4) A killing of a child less than thirteen (13) years of age, if the child's death results from a protracted pattern or multiple incidents of bodily injury committed by the defendant against such child and the death is caused either by the last injury or the cumulative effect of such injuries.

(b) A person convicted of first degree murder shall be punished by death or by imprisonment for life.

[3] Middlebrooks was also indicted for the crimes of Kidnapping, Tenn. Code Ann. § 39-2-301 in Count Two; Robbery by Use of a Deadly Weapon, Tenn. Code Ann. § 39-2-501, Count Three; and Aggravated Sexual Battery, Tenn. Code Ann. § 39-2-606, Count Four arising out of the same incident.

[4] Tenn. R. Crim. P. 12.3 requires the State to file notice 30 days before trial if it intends to seek the death penalty. Where, as here, the Grand Jury has returned an indictment for First-Degree Murder (in the course of a felony), the State has unlimited discretion whether it will seek the death penalty based upon the underlying felony murder.

mind" and (2) "the murder was committed while the defendant was engaged in committing the felony of Robbery, Larceny and Kidnapping." (T.R.P. 12).

At the conclusion of the trial phase of the proceedings the jury was instructed on both theories of First Degree Murder. The Court's charge included the following felony murder instructions:

> A person commits murder in the first degree in the perpetration of a felony if he kills any person during the perpetration of, or attempt to perpetrate certain specified felonies, including kidnapping or larceny. Kidnapping is the offense of forcibly or unlawfully confining, inveigling, or enticing away another, with the intent of causing him to be secretly confined against his will. Larceny is the offense of felonious taking and carrying away the personal goods of another, and is either grand or petit in degree.
>
> For you to find the defendant guilty of murder in the first degree in the perpetration of a felony, the State must have proven beyond a reasonable doubt the existence of the following elements:
>
> (1) that the defendant unlawfully killed the alleged victim;
>
> (2) that the killing was committed during the alleged perpetration or attempt to perpetrate the alleged kidnapping or larceny; that is, that the killing was closely connected to the alleged kidnapping or larceny, and was not a separate, distinct, and independent event, and
>
> (3) that the defendant specifically intended to commit the alleged kidnapping or larceny.

(J.A. 11-12, R. 1735-36)

The jury was also instructed on the Tennessee law of aiding and abetting.

> All persons aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders and punished as such. An aider and abbetor is one who advises, counsels, procures or encourages another to commit a crime.
>
> * * * *
>
> Constructive or actual presence, however, is not sufficient to make one a principal of the crime. There

must be some evidence, at least circumstantial, that the defendant knowingly participated in the crime. The defendant must have had knowledge of the crime being committed, and an intent to aid and abet. An aider and abettor, who has knowledge of the principal's unlawful intent, and assists the principal, is guilty in the same degree as the principal. When the aider and abettor does not share in the principal's intent, however, but is controlled by his own intent, the degree of guilt of the aider and abettor is not necessarily that of the principal. In determining the degree of the defendant's guilt, you should consider his criminal intent, and not the intent and degree of guilt of the principal offender, whom the defendant is accused of aiding and abetting.

(J.A. 6-7, R. 1728-1729)

The Jury's Verdict as to Count One [5] found Donald Middlebrooks: "guilty of murder in the First Degree in the Perpetration of a Felony, to-wit: Kidnapping as charged in Count One of the indictment." (J.A. 22-24, R. 1775)

The following day at the penalty phase of the trial, one of the two aggravating circumstances that the State relied on in seeking the death penalty was ". . . that the murder was committed during the commission of some other felony, to-wit: kidnapping is the felony that the State will be relying on . . . ," (R. 1799). The state incorporated all of the evidence that had been introduced at the first phase of the trial (R. 1803). No additional evidence was introduced to establish the aggravating circumstance that the murder had been committed during the course of a kidnapping.

Middlebrooks introduced the testimony of his half sister (R. 1826-1940) and a clinical psychologist (R. 1941-2103) in mitigation. His sister detailed Middlebrooks'

[5] The Jury also found Middlebrooks Guilty of Kidnapping as to Count Two, Not Guilty of Robbery by Use of a Deadly Weapon and all lesser included offenses as to Count Three, and Not Guilty of Aggravated Sexual Battery and all lesser included offenses as to Count Four. (J.A. 22-24)

life history, including his childhood sexual abuse, his head injuries, and his lengthy history of psychiatric problems. The clinical psychologist testified in detail about Middlebrooks' lengthy history of psychological problems, his severe personality disorders, his transient psychotic episodes, and Middlebrooks' frequent inappropriate affects (smiling and grinning at inappropriate times) which were a direct result of his mental illnesses (R. 1971).

As it had during its opening arguments, the state relied on the fact that it had already proven that the murder had occurred during the commission of a kidnapping, at the trial phase.[6]

At the close of the penalty phase, the Court instructed the jury that it must find at least one statutory aggravating circumstance before it could proceed to consider the imposition of the death penalty (R. 2198-2200) (J.A. 29, 31), and that if it found one or more aggravating circumstance, that it must weigh the aggravating circumstances against the mitigating factors (J.A. 31-34, R. 2201), and that if it found that the aggravating circumstances outweighed the mitigation, then the sentence must be death (R. 2203) (J.A. 33).

[6] During its opening statement at the penalty phase, the Assistant Attorney General made the following statements: "We will be relying on the same proof that you heard in the trial. And the trial testimony will be incorporated by reference for you to consider in that regard. It's not that the State needed this portion to go back and reprove what you've already heard. But that will be the proof that the State will be relying on, that this murder was, indeed, committed during the commission of some other felony; and as I said, kidnapping in this case is what the State would be relying on." (R. 1799)

During closing argument at the penalty phase, the same Assistant Attorney General made the following argument: "Okay, Now all the evidence that was in the trial also became a part of this hearing. The State's not required to go through again and prove to you that Kerrick Majors was killed during the time that he was kidnapped. You heard all of that. You know all of that, that the child was taken, he was drug away, that he was concealed, that he was tortured and that he was ultimately killed. There's no doubt about that, certainly not a reasonable doubt; and, I submit no doubt. . . ." (R. 2138)

Following deliberations, the jury returned its verdict:

> The form completed and submitted to the court is that entitled Punishment of Death. We the jury, unanimously find the following listed statutory aggravating circumstance or circumstances. The jury has listed in writing the murder was especially hanious [sic], attrocious [sic] or cruel and that it involved torture. The murder was committed while the defendant was engaged in committing kidnapping. The form further provides, we that the jury unanimously find that the statutory aggravating circumstance or circumstances so listed above outweigh the mitigating circumstance or circumstances. And further provides:- Therefore, we the jury, unanimously find that the punishment for the defendant, Donald Wayne [sic] Middlebrooks, shall be death.

(R. 2217) (J.A. 36-37)[7] The trial judge sentenced Donald Ray Middlebrooks to die in the electric chair (R. 2218).

C. Direct Appeal

On direct appeal, in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), the Tennessee Supreme Court affirmed Donald Middlebrooks' conviction of First Degree Murder and Kidnapping. It then considered two issues relating to the constitutionality of the death penalty for felony murder: (1) whether the death penalty *per se* is an unconstitutional punishment for felony murder; and (2) whether a jury may constitutionally impose the death penalty upon a felony murderer on the sole basis of the statutory aggravating circumstance (Tenn. Code Ann. § 39-2-203(i)(7) (1982)) which duplicates the elements of the underlying felony murder.

In Section II of its opinion, the Tennessee Supreme Court initially addresses whether the death penalty for felony murder is *per se* unconstitutional:

[7] The original verdict form is missing from the record. The form was read by the trial judge into the record when the jury returned its verdict. That portion of the transcript is included in the Joint Appendix at pp. 36, 37.

> A majority of the present Court has held that the death penalty *per se* does not violate Article I, § 16 of the Tennessee Constitution, *see State v. Black*, *supra*, 815 S.W. 2d at 189-91, but we have not yet considered the issue of the constitutionality of the death penalty as punishment for felony murder.

Middlebrooks, supra, at 335, App. to Cert. A 34.[8] The Court then notes that "The minimum standards for determining whether a sentence of death may be constitutionally imposed under the United States Constitution are indicated by the United States Supreme Court in *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) . . . ." *Middlebrooks*, 840 S.W.2d at 337; App. to Cert. A 40. Immediately thereafter, however, the Tennessee Supreme Court emphasizes that *"These federal standards do not, however, answer the question under the state constitution."* 840 S.W.2d at 338; App. to Cert. A 40 (emhasis supplied). Thus, under the Tennessee Constitution, "[W]e may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees, but may impose higher standards and stronger protections than those set by the federal constitution." 840 S.W.2d at 338; App. to Cert. A 40-41.

The analysis of the death penalty under the Tennessee Constitution has been ongoing. "The present Court first examined the constitutionality of the imposition of capital punishment under Article I, § 16 of the state constitution *State v. Black*, 815 S.W.2d 166 (Tenn. 1991)." *Middlebrooks*, 840 S.W.2d at 338; App. to Cert. A 41. When interpreting the Tennessee Constitution in *Black*, the Court made a considered decision and "elected to follow" the reasoning in *Gregg v. Georgia*, 428 U.S. 153 (1976) in independently analyzing the issue under Article I, § 16

[8] For the Court's convenience, Respondent will cite both the reported opinion in *Middlebrooks* as well as the Appendix to the Petition for Writ of Certiorari. (App. to Cert. ——)

of the Tennessee Constitution. *Middlebrooks*, 840 S.W.2d at 338; App. to Cert. A 41.[9]

Applying "the *Black* test," the Court concludes that the death penalty for felony murder is not *per se* unconstitutional under Article I, § 16 of the Tennessee Constitution. *See Middlebrooks*, 840 S.W.2d at 338-340, App. to Cert. A 42-48. The Tennessee Supreme Court relies upon numerous factors exclusive to Tennessee, in accordance with *Black*. *Middlebrooks*, 840 S.W.2d at 338-340, App. to Cert. A 42-47. The Tennessee Supreme Court concludes that, "[T]he death penalty for felony murder in Tennessee does not *per se* violate Article I, § 16 of the Tennessee Constitution." *Middlebrooks*, 840 S.W.2d at 340, App. to Cert. A 47. *See also*, 840 S.W.2d at 341, App. to Cert. A 48.

The Court then turns to the question whether the Tennessee capital sentencing statute does not "sufficiently narrow the population of death-eligible defendants under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution," given the "duplication of the elements of the offense by" the felony-murder aggravating circumstance. *Middlebrooks*, 840 S.W.2d at 341, App. to Cert. A 48-49. After acknowledging that it had previously rejected such arguments on other grounds, the Tennessee Supreme Court succinctly announces its judgment:

> Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, *see* Tenn. Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990), and we are of the opinion that Article I, § 16 of the Tennessee Constitution prohibits such duplication in capital sentencing as well.

Middlebrooks, 840 S.W.2d at 341, App. to Cert. A 49-50.

[9] Applying the Tennessee Constitution in *Black*, the Tennessee Supreme Court upheld the death penalty, because "the legislative and constitutional history of Tennessee indicates a clear intent that the death penalty is, in some cases, an appropriate form of punishment," and there was "nothing in the constitutional legislative history mandat[ing] that death is invalid *per se* as cruel and unusual under Article I § 16." *Middlebrooks*, 840 S.W.2d at 338; App. to Cert. A 41.

Having announced its conclusion that such procedure violates the Tennessee Constitution, the Court next undertakes to demonstrate that its conclusion is consistent with authorities in other jurisdictions. The Court cites and excerpts as a basis for its decision the reasoning from Tennessee's "sister state" of North Carolina in *State v. Cherry*, 257 S.E.2d 551 (1979), in which the North Carolina Supreme Court reached the identical holding as a matter of North Carolina law. *See Middlebrooks*, 840 S.W.2d at 341-342, App. to Cert. A 50-51.[10]

Only after stating its holding under "Article I, § 16 of the Tennessee Constitution" and citing *Cherry* does the Tennessee Supreme Court discuss Eighth Amendment caselaw and its requirement of "genuine narrowing," as stated in *Zant v. Stephens*, 462 U.S. 862 (1983). *Middlebrooks*, 840 S.W.2d at 342-346, App. to Cert. A 51. Even then, the Court alludes to the reasoning of a Wyoming State Supreme Court Justice (later adopted by the Wyoming Supreme Court, *see, Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991))—not federal law—as support for its conclusion that "Tennessee's statute fails to narrow the class of persons eligible for the death penalty." *Id.* at 342, *citing Engberg v. State*, 686 P.2d 541, 560 (Wyo. 1984) (Rose, J., dissenting), App. to Cert. A 52.

The Court next proceeds to review the history of the narrowing requirement, relying upon Professor Richard Rosen's article, *Felony Murder And The Eighth Amendment Jurisprudence of Death*, 31 B.C.L.Rev. 1103 (1990). *Middlebrooks*, 840 S.W.2d at 342 et seq., App. to Cert. A 52. In discussing the rationale adopted to invalidate an Arkansas death sentence in *Collins v. Lock-*

[10] As a historical matter, the territory of Tennessee was annexed by North Carolina in 1776, and then ceded by North Carolina to the United States in 1789, with a territorial government being created in 1790. Between 1776 and 1790, the North Carolina Constitution was the law of the land in Tennessee. The Tennessee Constitution was then modeled upon the North Carolina Constitution. Laska, *The Tennessee State Constitution* (Greenwood Press: 1990) at 2. Not surprisingly, the Tennessee Supreme Court has looked to North Carolina law as a foundation for its judgment.

hart, 754 F.2d 258 (8th Cir. 1985)—but later repudiated by the Eighth Circuit—the Tennessee Supreme Court notes: "This Court has previously refused to follow the *Collins* rationale by finding it inapplicable *under the Tennessee Constitution*." *Middlebrooks*, 840 S.W.2d at 346, App. to Cert. A 61 (emphasis supplied). It then examines this Court's Eighth Amendment ruling in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and concludes that "*Lowenfield* is inapposite and provides no rationale for constitutionality *under the Tennessee Constitution*." *Middlebrooks*, 840 S.W.2d at 346, App. to Cert. A 62 (emphasis supplied).

Having concluded that the *Lowenfield* rationale provides no guidance on the narrowing question under the Tennessee Constitution, the Tennessee Supreme Court holds that the application of the felony murder aggravating circumstance to a person convicted of felony murder in Tennessee "does not narrow the class of death-eligible murders sufficiently under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution, because it duplicates the elements of the offense." *Middlebrooks*, 840 S.W.2d at 346, App. to Cert. A 63. The Court reiterates that such application of the felony-murder aggravating circumstance "is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder." *Id.*

In a separate opinion, Justices Reid and Daughtrey acknowledge that the Court's judgment is based upon the provisions of the Tennessee Constitution: "This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a 'demonstrably smaller and more blameworthy' class of murders." *Middlebrooks*, 840 S.W.2d at 350, App. to Cert. A 75 (Reid, C.J. and Daughtery, J., concurring and dissenting).

In its judgment order, the Tennessee Supreme Court affirms that its judgment is independently based upon its interpretation of Article I, § 16 of the Tennessee Constitution: "[T]his Court affirms appellant's conviction, but reverses the sentence on the grounds that the aggravating circumstance set out in Tenn. Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder." (J.A. 38, 39)

SUMMARY OF THE ARGUMENT

The judgment of the Tennessee Supreme Court rests upon the adequate and independent State ground of Article I, § 16 of the Tennessee Constitution. This Court lacks jurisdiction to review that judgment under Article III of the United States Constitution and 28 U.S.C. § 1257.

The Tennessee Supreme Court concluded that, because the Tennessee Legislature prohibited enhancement of non-capital sentences by the use of facts that are elements of the underlying offense, *See* Tenn. Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990), Article I, § 16 of the Tennessee Constitution prohibits such duplication for purposes of enhancement in capital sentencing. This result was reached entirely by interpreting the Tennessee Constitution in the light of Tennessee statutes. It was independently supported by a second line of state constitutional analysis in which the Tennessee Supreme Court referred to the non-federal reasoning of the North Carolina Supreme Court in *State v. Cherry*, 257 S.E.2d 551 (1979), and to the opinion in *Collins v. Lockhart*, 754 F.2d 257 (8th Cir. 1985)—which the Tennessee Supreme Court explicitly acknowledged had been overruled as an authoritative federal constitutional precedent—before proceeding also to take account of the reasoning of such opinions of this Court as *Lowenfield v. Phelps*, 484 U.S. 231 (1988). The unambiguous and repeated language of the Tennessee Supreme Court makes clear that it is not relying upon federal law, but is looking to the reasoning of *Cherry* and *Collins* as a basis for judgment under the Tennessee Constitution. The Tennessee Supreme Court reiterates that it is rendering its judgment

under "the Tennessee Constitution" and that it is looking to federal constitutional cases, such as *Lowenfield* only for whatever persuasive force their reasoning may have as applied to Article I, § 16, which the Tennessee Supreme Court specifically says twice, is not construed *in pari materia* with the Eighth Amendment. Because the Tennessee Supreme Court did not feel compelled by federal law to interpret Article I, § 16 as it did, Article I, § 16 provides an adequate and independent state ground for the judgment. That the Tennessee Supreme Court *also*, as an alternative holding, found that the Tennessee statute violated federal Eighth Amendment principles, does not suffice to confer jurisdiction on this Court.

If the Court should conclude that it does have jurisdiction and reaches the Eighth Amendment issue, the alternative holding of the Tennessee Supreme Court that Donald Middlebrooks' sentence of death offends not only Article I, § 16 of the Tennessee Constitution but also the Eighth Amendment must be affirmed.

This Court's Eighth Amendment jurisprudence from *Gregg v. Georgia*, 428 U.S. 153 (1976), through *Arave v. Creech*, 507 U.S. ——, 113 S. Ct. 1534 (1993) has consistently required that state death sentencing systems "genuinely narrow" the class of persons eligible for the death penalty in a manner that rationally justifies the imposition of a more severe sentence in some cases than in others. Tennessee has failed to do this.

Tennessee defined the class of death eligible murderers as all first degree murderers. Tenn. Code Ann. § 39-2-202 (b) (1992). This class includes two broad categories of murderers: 1) those who kill with premeditation, malice, deliberation, and willfulness, and 2) those whose killings are committed in the course of a long list of felonies. The state need prove no *mens rea* for felony murderers other than the intent to commit the underlying felony. Tennessee also makes all accomplices equally culpable as principals. The class is broader than the class of murderers eligible for the death penalty at the time of *Furman*. Tennessee's only means of narrowing this broad class of murderers for capital sentencing purposes is to

require proof of one statutory aggravating circumstance at the penalty phase before the jury can consider the imposition of the death penalty. Tenn. Code Ann. § 39-2-203(i) (1982).

For premeditated murderers, this is a genuine and meaningful requirement because it necessitates proof of aggravating elements not encompassed by proof of the first degree murder itself. For felony murderers, the requirement of proof of a statutory aggravating circumstance is made illusory and meaningless by the felony murder aggravating circumstance which authorizes a sentence of death without proof of any additional fact or element by the state.

The Tennessee Supreme Court could find no principled basis for this distinction under either Article I, § 16 of the Tennessee Constitution or the Eighth Amendment. By automatic subjecting of all felony murderers to a capital sentence that cannot be imposed on any premeditated murderer without proof of additional aggravation going beyond the base elements of first degree murder, Tennessee has failed to "genuinely narrow" the class of persons eligible for capital sentencing in the manner required by the Eighth Amendment to insure a rational and even-handed administration of the death penalty.

ARGUMENT

I. THE JUDGMENT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND, AND THIS COURT THEREFORE LACKS JURISDICTION TO REVIEW THE JUDGMENT BELOW

Under Article III of the United States Constitution and 28 U.S.C. § 1257, this Honorable Court must dismiss the Writ of Certiorari for lack of jurisdiction, because the Tennessee Supreme Court's judgment below rests on an adequate and independent state ground. The Tennessee Supreme Court's judgment rests upon Article I, § 16 of the Tennessee Constitution, which provides an alternative, independent, and adequate state ground for the judgment below.

A. This Court Lacks Jurisdiction To Review a State Court Judgment Which Rests on an Adequate and Independent State Law Ground of Decision

Under Article III of the United States Constitution and 28 U.S.C. § 1257, "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. ——, 111 S.Ct. 2546, 2553-2554 (1991); *Fox Film Corp. v. Miller,* 296 U.S. 207, 210 (1935); *McCoy v. Shaw,* 277 U.S. 302, 303 (1928); *See Sochor v. Florida,* 504 U.S. ——, 112 S.Ct. 2114, 2119-2120 (1992). "[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487, 489 (1965), *quoting Cramp v. Board of Public Instruction,* 368 U.S. 278, 281 (1961) (citation omitted).

Thus, when a State Court judgment invokes both state and federal law as alternative bases for its judgment, this Court's jurisdiction fails. *Sochor v. Florida,* 504 U.S. ——, 112 S.Ct. at 2119-2120 (federal jurisdiction precluded if, in state judgment, "the state ground is an alternative holding"); *Harris v. Reed,* 489 U.S. 255, 264 n. 10 (1989) ("a state court need not fear reaching the merits of a federal claim in an *alternative* holding," thereby preventing federal review by invoking a state law ground "as a separate basis for decision.") This Court cannot review any state judgment grounded on an adequate and independent state ground, "even though the State court may have also summoned to its support an erroneous view of federal law." *Radio Station WOW v. Johnson,* 326 U.S. 120, 129 (1945). *Cf. Colorado v. Nunez,* 465 U.S. 324 (1984) (per curiam) (dismissing writ of certiorari as improvidently granted, with concurring Justices noting that state law judgment inconsistent with federal law).

This Court's inability to review such judgments derives from two principles. First, this Court only reviews *judgments* of the state courts. 28 U.S.C. § 1257; *Coleman,* 111 S.Ct. at 2554 ("When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257 it is reviewing a *judgment.*"); *Black v. Cutter Laboratories,* 351 U.S. 292, 297-298 (1956) ("This Court . . . reviews judgments, not statements in opinions."); *Fashnacht v. Frank,* 23 Wall. (90 U.S.) 416 (1874). Second, this Court is constitutionally compelled not to render advisory opinions. *Henry v. Mississippi,* 379 U.S. 443, 446-447 (1965); *Bell v. Maryland,* 378 U.S. 226, 237 (1964).

Consequently, if a state court judgment rests on an adequate and independent state law ground, "resolution of a federal question cannot affect the judgment, [and] there is nothing for the Court do do." *Coleman,* 501 U.S. at —, 111 S.Ct. at 2554. As this Court has stated:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977), *quoting Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945). Therefore, in the context of direct review of a state court judgment, "the independent and adequate state ground doctrine is jurisdictional." *Coleman,* 501 U.S. at —, 111 S.Ct. at 2554.

In reviewing a state court judgment, this Court is obliged to address the jurisdictional question whether the state court judgment rests on an independent, adequate non-federal ground. *See Douglas v. Alabama,* 380 U.S. 415, 422 (1965). To make this determination, this Court must "examine the opinion of the state court to ascertain whether a federal question was raised and de-

cided and whether the court rested its judgment on an adequate non-federal ground." *Indiana ex. rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938). This Court must examine both the structure of the State Court opinion, as well as its precise wording. *California v. Freeman*, 488 U.S. 1311, 1313 (1989) (O'Connor, J., in chambers) (finding adequate and independent state ground after evaluating structure of California Supreme Court opinion); *See Coleman v. Thompson*, 111 S.Ct. at 2559 (examining State court opinion).

When a State Court invokes a state ground for judgment, that State ground is independent of federal law if the State Court has not "felt *compelled* by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (emphasis supplied); *Dept. of Mental Hygiene of California v. Kirchner*, 380 U.S. 194 (1965) (State law ground not independent if "State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution"); *United Air Lines v. Mahin*, 410 U.S. 623, 630-631 (1973) (state ground not independent if state court under mistaken impression that federal law compelled a particular interpretation of state law); *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 120 (1924) (state ground not independent because state court thought federal constitution required its judgment).

Similiarly, a state law ground for decision is dependent upon federal law only if a "federal law holding is integral to the state court's disposition of the matter," and "resolution of the state . . . law question depends on a federal constitutional ruling." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). Interpretation of federal law must be "an indispensable predicate" to resolution of the state law issue before the state ground can be considered "dependent" upon federal law. *Xerox Corp. v. County of Harris*, 459 U.S. 145, 149 (1982). A state law ground is dependent on federal law only if interpretation of federal law is "necessary to the determination of the cause," and

"the judgment as rendered could not have been given without" interpreting federal law. *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U.S. 206, 212-213 (1938); *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). *See also Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164-165 (1917).

In an effort to simplify the problem of determining when a state court judgment rests upon an adequate and independent state ground, this Court has set forth the following test for construing state court judgments:

> When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did *because it believed that federal law required it to do so.*

Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983) (emphasis supplied)[11]. If this Court determines that this test has been met, it will assume jurisdiction. If the test is not met, it will not. *Coleman*, 501 U.S. at —, 111 S.Ct. at 2555.

As this Court has explained, when applying the *Long* presumption, "[W]e merely assume that there are no such [adequate and independent state] grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision *primarily* on federal law." *Long*, 463 U.S. at 1042 (footnote omitted).

When a state court merely looks to the reasoning of federal cases to guide its interpretation of state law, it is still state law that forms the basis for the State Court

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[11] The *Long* test thus equates "interwoven with federal law" with the determination whether a State law ruling is predicated upon an antecedent ruling of federal law, i.e., whether "resolution of the state . . . law question depends on a federal constitutional ruling." *Ake*, 470 U.S. at 75.

judgment since federal law does not compel the result. *See Id.* at 1041; *Coleman,* 111 S.Ct. at 2556. Additionally, when a state court makes "an *alternative* holding," in which it "explicitly invokes" a state law ground "as a separate basis for decision," there is an adequate and independent state ground which precludes federal review. *Harris v. Reed,* 489 U.S. at 264 n. 10 (emphasis in original).

B. The Judgment of the Tennessee Supreme Court Rests Upon Article I, § 16 of the Tennessee Constitution, Which Is an Adequate and Independent State Ground of Decision

Review of the structure and wording of the Tennessee Supreme Court's judgment reveals that Article I, § 16 of the Tennessee Constitution provides an alternative, adequate and independent state ground for the judgment below.

The judgment of the Tennessee Supreme Court clearly reveals Article I, § 16 as an adequate and independent state ground supporting the judgment. Indeed, as it had done in both *State v. Black* and earlier in their opinion, the majority of the Tennessee Supreme Court repeatedly invokes Article I, § 16 of the Tennessee Constitution as a basis for its decision, making clear that Article I, § 16 provides a basis for judgment which is wholly separate and independent from the strictures of the Eighth Amendment. *See and compare Middlebrooks,* 840 S.W.2d at 338; App. to Cert. A 40 (Article I, § 16 may impose higher standards than Eighth Amendment); *Id.* at 340 App. at Cert. A 47 (citing Article I, § 16); *Id.* at 341 App. to Cert. A 48-50 (citing Article I, § 16 three times); *Id.* at 346 App. to Cert. A 62-63 (citing Article I, § 16 twice); *Id.* at 350 App. to Cert. A 75 (Reid, C.J. and Daughtrey, J., concurring) (citing Article I, § 16 as basis for judgment).

In fact, because Justices Reid and Daughtrey explicitly hold in their concurrence that Article I, § 16 is the basis for the Tennessee Supreme Court's judgment, Article I, § 16 is the narrowest basis for judgment on which a

majority agree, and must therefore be considered the basis for the Tennessee Supreme Court's judgment, which insulates the judgment from federal review. *See Franklin v. Lynaugh,* 487 U.S. 164, 191 n.1 (1988) (Stevens, J., dissenting) (when no single rationale supports judgment, holding of court considered position of justices who concurred on the narrowest grounds); *Marks v. United States,* 430 U.S. 188, 193 (1977).

The structure and wording of the opinion also demonstrate that the judgment is based primarily upon Article I, § 16, and not primarily upon the Eighth Amendment. The majority's initial holding is that enhancement of a sentence using identical elements of the offense is prohibited as a matter of Tennessee law in non-capital sentencing under Tenn. Code Ann. § 40-35-111 (1982) and Tenn. Code Ann. § 40-35-114 (1990), therefore: "Article I, § 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well." *Middlebrooks,* 840 S.W.2d at 341; App. to Cert. A 50. This rationale, the point of departure for the Tennessee Supreme Court's judgment, is devoid of any federal citation, any federal implications, and of any federal rationale. It is purely a matter of Tennessee law and Tennessee policy governing the sentencing of all criminal defendants convicted in Tennessee courts.

Immediately thereafter, in support of this holding, the Court cites, adopts, and explains the rationale of the North Carolina Supreme Court in *State v. Cherry,* 298 N.C. 86, 257 S.E.2d 551 (1979) an entirely non-federal decision based upon North Carolina law. In explaining *Cherry,* the Court quotes from the North Carolina Supreme Court's reasoning that "double-counting" in North Carolina unfairly disadvantaged felony-murderers, thereby creating "a flaw in the statute" which the North Carolina Supreme Court chose to remedy. By adopting the rationale of its sister state in *Cherry,* the Tennessee Supreme Court is not relying on federal law.

By stating near the end of its opinion at least twice that it is seeking a rationale "under the Tennessee Consti-

tution," *Middlebrooks*, 840 S.W.2d at 346; App. to Cert. A 62-63, the Court makes clear that it is not deciding the case "primarily on federal law" or for reasons that are "interwoven with federal law." Rather, the Court is rendering its judgment based upon Tennessee law and the Tennessee Constitution, having looked to federal cases "for the purpose of guidance" which "do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. at 1041. The fact that the Court evaluates the reasoning of the federal cases of *Collins* and *Lowenfield* to see whether they may provide a satisfactory rationale "under the Tennessee Constitution" demonstrates that the Court has considered such cases not for their precedential value, but insofar as their *reasoning* is viable for purposes of Tennessee constitutional interpretation. Indeed, because *Collins* itself has been overruled, *Collins* has no precedential value as federal law, but retains vitality only to the extent that its reasoning is valid. By citing the overruled *Collins*, the Tennessee Supreme Court by definition cannot be relying upon federal law. Rather, the Court is only seeking guidance from *Collins'* logic for purposes of interpreting the Tennessee Constitution. Under the Supremacy Clause of the United States Constitution, a State Court which elects to adopt the reasoning of a federal appeals court "does so only because it chooses to and not because it must." *Lockhart v. Fretwell*, 506 U.S. ——, 122 L.Ed.2d 180, 193 (1993) (Thomas, J., concurring).

The structure and wording of the opinion thus demonstrate that the judgment rests on Tennessee law, not federal law. Because the judgment " 'fairly appears' to rest primarily on state law," the *Long* presumption cannot be applied and this Court lacks jurisdiction. *Coleman v. Thompson*, 501 U.S. at ——, 111 S.Ct. at 2559. The Tennessee Supreme Court's judgment does not "fairly appear to rest primarily on federal law or to be interwoven with federal law." Rather, it is based primarily upon Tennessee law and the Tennessee Constitution.

Indeed, the majority and concurring opinions demonstrate that the Tennessee Supreme Court has in no way felt "compelled" to render its State Constitutional decision based upon its view of federal law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 568. Rather, it is merely looking to federal law for a "rationale for constitutionality under the Tennessee Constitution." *Middlebrooks*, 840 S.W.2d at 346, App. to Cert. A 62. Interpretation of the Eighth Amendment is not "necessary to the determination of the cause." *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U.S. at 212. Before ever mentioning any possible Eighth Amendment rationale, the Tennessee Supreme Court first holds that such duplication violates Article I, § 16. Such a judgment is given without interpreting federal law. Even though federal cases are mentioned, the Tennessee Supreme Court is "not driven by that discussion" when reaching its independent conclusion concerning the meaning of the Tennessee Constitution. *California v. Freeman*, 488 U.S. at 1314 (O'Connor, J., in chambers).

Even though the Eighth Amendment is cited in conjunction with the Tennessee Constitution near the end of the opinion, the Eighth Amendment provides nothing more than an "alternative holding" to the Tennessee Supreme Court's judgment that Donald Middlebrooks' sentence violates Article I, § 16 of the Tennessee Constitution. Because the federal holding is, at most, only an alternative holding, this Court cannot assume jurisdiction over the judgment below. *Harris v. Reed*, 489 U.S. at 264 n. 10; *Sochor v. Florida*, 112 S.Ct. at 2120 & n **, Para. 2.

Review of the Tennessee Supreme Court's judgment reveals three alternative holdings: (1) Because duplication for enhancement purposes is generally prohibited in sentencing in Tennessee, Article I, § 16 prohibits such duplication in capital sentencing as well; (2) Because application of the felony-murder aggravating circumstance to a felony-murderer irrationally disadvantages felony-murderers vis-a-vis premeditated murderers in Tennessee, such application violates Article I, § 16 of the Tennessee Con-

stitution; (3) Because it does not narrow the class of death-eligible defendants in Tennessee, application of the felony-murder aggravating circumstance to felony-murderers violates the Eighth Amendment.

In attempting to review this judgment, supported by alternative Tennessee and federal holdings, this Court cannot alter the fact that the Tennessee Legislature has prohibited the use of duplicated elements as a basis for enhancement in non-capital sentencing, or that the Tennessee Supreme Court has held that Article I, § 16 of the Tennessee Constitution therefore prohibits such duplication of elements for enhancement in capital cases. This Court also cannot alter the fact that the Tennessee Supreme Court has, after a careful review of the reasoning of non-federal cases and federal cases, adopted a rationale under Article I, § 16 that prohibits application of the felony-murder aggravating circumstance to felony-murderers. Regardless of what this Court could decide as a matter of Eighth Amendment jurisprudence, the Tennessee Supreme Court's two alternative judgments based upon the Tennessee Constitution will remain intact. Because "the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 566. Therefore, this Court's jurisdiction fails.

The judgment below is not a judgment in which the State Court:

(1) "[N]owhere suggested a state rule governing decision." *Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986);

(2) "[D]id not cite the State Constitution at all." *California v. Brown*, 475 U.S. 1301, 1305 (1986) (Rehnquist, J., in chambers); *Washington v. Chrisman*, 455 U.S. 1 (1982);

(3) Cited no State authority at all. *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90 (1981);

(4) Made only one brief and ambiguous statement referring to state law as a basis for decision. *Quinn v. Millsap*, 491 U.S. 95, 100-101 n. 6 (1989);

(5) Invoked a governing principle of law, but never referred specifically to a State Constitutional guarantee or rule of procedure. *Ohio v. Johnson*, 467 U.S. 493, 497 n. 7 (1984); *Harris v. Reed*, 489 U.S. 255 (1989);

(6) Failed to mention a state constitutional provision or the State constitution in general as a basis for decision, and only cited state cases which relied upon the United States Constitution. *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 2798 (1990);

(7) Mentioned the state constitution once, and then mentioned it again in conclusion, but cited only state or federal cases construing federal law. *Florida v. Riley*, 488 U.S. 445, 447 n.1 (1989); *Texas v. Brown*, 460 U.S. 730, 732 n. 1 (1983); *New Jersey v. Portash*, 440 U.S. 450, 453 n. 3 (1979);

(8) Cited only a state constitutional provision which is coextensive and which the State court construes in *pari materia* with its federal counterpart, *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 2643 n. 4 (1990); *Maryland v. Garrison*, 480 U.S. 79, 83-84 n. 6-7 (1987); *Michigan v. Chesternut*, 486 U.S. 567, 571 n. 3 (1988);

(9) Consistently referred to the federal constitution as supporting its ruling, and gave no indication that its state constitution provided rights which "were distinct from, or broader than" rights guaranteed by the federal constitution. *Kentucky v. Stincer*, 482 U.S. 730, 735 n. 7 (1987); *Delaware v. Prouse*, 440 U.S. 648, 651-653 (1979);

(10) Mentioned the State constitution only once, and then only in conjunction with the federal

constitution, where both state and federal constitutions were cited for the same propositions. *New York v. Class*, 475 U.S. 106, 108-110 (1986); *New York v. P. J. Video*, 475 U.S. 868, 872 n. 4 (1986);

(11) Never mentioned the State constitution "on its own apart from federal law." *Asarco v. Kadish*, 490 U.S. 605, 625 (1989);

(12) Held that state action violated both State and federal constitutional protections, but drew no distinction between the state & federal constitutions. *South Dakota v. Neville*, 459 U.S. 553, 556 n.5 (1983);

(13) Referred only to the federal constitution and prior state case(s) which had only construed the federal constitution. *Maine v. Thornton*, 446 U.S. 170, 175 n. 5 (1984); *California v. Beheler*, 463 U.S. 1121, 1123 n. 1 (1983);

(14) Relied upon all federal cases, except one state case, which was decided on federal constitutional grounds. *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982);

(15) Made no statement that a state ruling was itself the basis of its judgment. *California v. Ramos*, 463 U.S. 992, 997 n.7 (1983).

Rather, the Tennessee Supreme Court: (a) repeatedly invokes Article I, § 16 of the Tennessee Constitution; (b) invokes Article I, § 16 of the Tennessee Constitution at the beginning of its analysis in relying upon Tennessee practice in non-capital cases and the reasoning of the non-federal case of *Cherry* rather than relying upon federal constitutional principles or federal cases; (c) invokes Article I, § 16 by itself in various parts of its judgment; (d) states and demonstrates that Article I, § 16 of the Tennessee Constitution and the Eighth Amendment are analytically distinct and not construed in *pari materia*; (e) cites as authority cases decided on non-federal grounds; (f) considers the rationale of federal cases insofar as they might provide a legitimate rationale for interpreting the Tennessee Constitution; and (g) reaches its state law conclusion by adopting the rationale of a case (*Collins*) which has no precedential value as federal law. As apparent from the structure and wording of its judgment, the Tennessee Supreme Court rests its judgment upon the adequate State ground of Article I, § 16 of the Tennessee Constitution, which is completely independent of federal law.

Article III and 28 U.S.C. § 1257 therefore prohibit this Court's review of the judgment below. Accordingly, because this Court has no jurisdiction to review the judgment, the writ of certiorari should be dismissed for lack of jurisdiction. *Florida v. Casal*, 462 U.S. 637 (1983) (per curiam) (dismissing writ of certiorari as improvidently granted, based upon adequate and independent state ground); *Cf. Ohio v. Huertas*, 498 U.S. 336 (1991).

II. TENNESSEE FAILED TO "GENUINELY NARROW" THE CLASS OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY THROUGH THE FELONY-MURDER AGGRAVATING CIRCUMSTANCE

The Tennessee Supreme Court has concluded that the automatic application of the felony murder aggravating circumstance to a defendant whose first-degree murder conviction rested solely on a felony murder theory failed to genuinely narrow the class of felony murderers eligible for the death penalty either under Article I, § 16 of the Tennessee Constitution or the Eighth Amendment. The alternative Eighth Amendment ground, while not properly before this Court as a jurisdictional matter, is substantively correct as applied to Donald Middlebrooks. Because the history and operation of Tennessee's first-degree murder and death penalty statutes are critical to analysis of this question, *see, Zant v. Stephens*, 462 U.S. 862, 870, 875 (1983), they will be discussed first. Applying Eighth Amendment principles, Respondent will then demonstrate why his sentence of death violates the Eighth Amendment.

A. Tennessee Law of First-Degree Murder and the Operation of the Tennessee Capital Sentencing Scheme

In Tennessee, at the time of Donald Middlebrooks' conviction, the death penalty was an available punishment only for the crime of First Degree Murder. Tenn. Code Ann. § 39-2-202(b) (1982), *See* App. A. The Tennessee Legislature had broadly defined first-degree murder to include two separate classes of murderers:

> Every murder [1] perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premediated killing, or [2] committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

Tenn. Code Ann. § 39-2-202(a)(1982).[12]

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[12] At the time of this Court's decision in *Furman* in 1972 the First Degree Murder statute was essentially identical except the underlying felonies that would have supported a conviction for first degree murder were limited to: "any murder in the first degree, arson, rape, robbery, burglary, or larceny." Tenn. Code Ann. § 39-2402 (1955). *See*, App. A. Donald Middlebrooks would not have been eligible for the death penalty as a kidnap-murderer in 1972.

The 1974 amendments to the first degree murder statute, enacted in light of *Furman*, increased the number of underlying felonies to include: "any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy or unlawful throwing, placing, or discharging of a destructive device or bomb." Tenn. Code Ann. § 39-2402(4) (1975). This substantially expanded the class of felony first degree murderers who would be eligible for the death penalty. Notably, the 1974 amendments ameliorated this expansion of the list of predicate felonies by introducing the requirement of a *mens rea* element that the killing be "willful, malicious, and deliberate." Because this statute provided a mandatory death sentence upon conviction of such narrowly-defined, highly culpable offenses, the Legislature enacted the present death sentencing scheme in 1977, to correct the unconstitutionality of the mandatory sentencing scheme. *See* Raybin, *New Death Penalty Statute Enacted for Tennessee*, Judicial Newsletter, University of Tennessee College of Law (May, 1977). *See, Collins v. State*, 550 S.W.2d 643 (Tenn. 1972).

The 1977 and 1982 amendments retained the expanded list of underlying felonies and restored first degree murder as an underlying felony: "any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb" but dropped the *mens rea* elements that the killing be "willful, malicious, and deliberate." Tenn. Code Ann. § 39-2402 (1975 & 1977 supp.), Tenn. Code Ann. § 39-2-202 (1982). The 1982 definition remained in effect at the time of Middlebrooks' conviction in 1989.

In the 1989 amendment, the Tennessee Legislature retained the expanded list of underlying felonies but abandoned felony murder *simpliciter* by adding the *mens rea* element of recklessness. Tenn. Code Ann. § 39-13-202(a)(2) (1989). See footnote 2, *supra*.

Tennessee classifies felony murder only as first degree murder. There does not exist a crime of second degree felony murder in Tennessee.

[13] This interpretation of Tennessee law has been consistently reaffirmed by the Tennessee Supreme Court. *See State v. Bane*, —— S.W. 2d ——, 1993 WL 126650*3 (Tenn. 1993), slip op. at 5 ("Malice and an intent to kill are not elements of felony murder."); *State v. McKay*, 680 S.W. 2d 447, 451 (Tenn. 1984); *State v. Johnson*, 661 S.W. 2d 854, 861 (Tenn. 1983); *Farmer v. State*, 296 S.W.2d 879, 883 (Tenn. 1956); *State v. Hopper*, 695 S.W. 2d 530, 535 (Tenn. Crim. App. 1985); *Tosh v. State*, 527 S.W. 2d 146, 147-148 (Tenn. Crim. App. 1975). When the offense is committed in the perpetration of a designated felony, the elements of malice, deliberation, willfulness and premeditation need not be proven, because they exist by implication. *State v. Barber*, 753 S.W.2d 659, 671 (Tenn. 1988); *State v. Norris*, 684 S.W.2d 650, 653 (Tenn. Crim. App. 1984); *Bass v. State*, 231 S.W. 2d 707 (Tenn. 1951); *Floyd v. State*, 50 Tenn. 342 (1871).

Conviction of premediated first-degree murder required proof of the elements of "malice," "premeditation," "deliberation," and "wilfulness." Tenn. Code Ann. § 39-2-202(a)(1982); *See State v. Brown*, 836 S.W.2d 530 (Tenn. 1992); *State v. West*, 844 S.W.2d 144 (Tenn. 1992). However, no *mens rea* relating to the killing was required for a conviction of felony First-Degree murder. *See, e.g., State v. Cauthern*, 778 S.W.2d 39, 47 (Tenn. 1989) ("Malice is not an element of felony murder.").[13] To find Middlebrooks guilty of First-Degree murder, the

jury was merely required to find that the killing was unlawfully committed during the course of a kidnapping and that Middlebrooks, as a party, could be held to have specifically intended to commit the kidnapping. *See, supra* at 5, 6 (J.A. 6-7, 11-12). Whether or not Middlebrooks intended to or did cause the death was irrelevant to the jury's guilt determination. As Middlebrooks' jury was instructed, Tennessee law makes principals and accomplices equally culpable. Tenn. Code Ann. §§ 39-1-103, 39-2-206 (1982) (J.A. 6-7, R. 1728-1729).[14]

This broad class of first-degree murderers was described as the class of murderers who were eligible for the death penalty. Tenn. Code Ann. § 39-2-202(b)(1982) ("A

[14] The Tennessee Supreme Court summarized the scope of the felony murder *simpliciter* doctrine in Part II of *Middlebrooks*, at 336, App. to Cert. A 36-37:

> The Tennessee offense extends both to the killer and his accomplices. A defendant who is a willing and active participant in a robbery becomes accountable for all of the consequences flowing from the robbery and may be convicted of first-degree murder where a co-perpetrator of the felony is the actual killer. *Dupes v. State*, 209 Tenn. 506, 512, 354 S.W.2d 453, 456 (1962); *Woodruff v. State*, 164 Tenn. 530, 537, 51 S.W.2d 843, 845 (1932); *Moody v. State*, 46 Tenn. 299, 305-307 (1869); *State v. Brown*, 756 S.W.2d 700, 703 (Tenn. Crim. App. 1988); *State v. Hopper*, *supra*, 695 S.W.2d at 535.
>
> The result of the felony murder doctrine in Tennessee is thus to impose a rule of strict liability allowing the underlying felonious intent to supply the required mens rea for the homicidal actus reus and to impose vicarious liability for the acts of another. *See, generally*, Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356, 366-369 (1978). Therefore, Tennessee's statute allows convictions for first-degree felony murder of those who commit accidental killings, and of persons who did not kill the victim and may not have intended that the victim be killed or suffer any physical harm.

The jury's verdict that Middlebrooks was guilty of first degree murder during the course of a kidnapping therefore entailed nothing more than a determination that Kerrick Majors was unlawfully killed during the course of his being kidnapped, and that Donald Middlebrooks aided and abetted in that kidnapping.

person convicted of murder in the first degree shall be punished by death or by imprisonment for life"). A conviction of first degree murder alone was punishable by life imprisonment and did not by itself expose a defendant to the jury's exercise of its discretion to impose a sentence of death. At a separate sentencing hearing, the state was required to prove at least one statutory aggravating circumstance: "No death penalty shall be imposed but upon a unanimous finding . . . of the existence of one or more of the following statutory aggravating circumstances . . ." Tenn. Code Ann. § 39-2-203(i)(1982).

If, at the penalty phase, the jury found that the State had proven at least one statutory aggravating circumstance, it then weighed the statutory aggravating circumstance(s) against mitigating circumstances. Tenn. Code Ann. § 39-2-203(e) (1982); *State v. Barber*, 753 S.W.2d 659 (Tenn. 1988). Absent proof of mitigating circumstances sufficient to outweigh the aggravating circumstances, however, death was the required punishment. Tenn. Code Ann. § 39-2-203(g) (1982).[15] A first-degree murderer was, therefore, required to overcome the presumption that death was the appropriate punishment once a statutory aggravating circumstance had been proven.

Tenn. Code Ann. § 39-2-203(i)(7)(1982), the felony murder aggravating circumstance, included an identical

[15] Tenn. Code Ann. § 39-2-203(g) (1982) stated in pertinent part: "If a jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances the sentence shall be death. . . ."

This provision was amended in 1989. The State now bears the burden of proving that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(g)(1) (1991) now reads in pertinent part:

> "If the Jury unanimously determines that: * * *
> (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt; then the sentence shall be death."

list of underlying felonies as were enumerated in the first degree murder statute. *See* App. A. No elements not already contained in the first degree murder definition were required to be proven. In every "death eligible" felony first degree murder case where the state sought the death penalty, the jury was compelled to find this statutory aggravating circumstance without proof of any additional fact or element by the state. This finding automatically required the defendant to establish mitigating circumstances sufficient to overcome the presumption of death as the appropriate penalty.

The Tennessee Supreme Court's interpretation of Tennessee's death penalty statute is conclusive for purposes of Eighth Amendment analysis. Indeed, "It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. ——, 112 S.Ct. 1130, 1139 (1992).

B. The Class of Persons Eligible for the Death Penalty Was Not "Genuinely Narrowed"

Tennessee defined felony first-degree murder and the felony-murder aggravating circumstance to have identical elements. Proof of felony-murder entailed proof of the felony-murder aggravating circumstance. All felony murderers were thus automatically subject to the death penalty while no premeditated murderers were ever subject to the death penalty absent proof of an additional aggravating element. Thus, the class of persons eligible for the death penalty was not "genuinely narrowed" in a rational, principled manner justifying the imposition of the sentence of death on Donald Middlebrooks.

1. *The Eighth and Fourteenth Amendments Require "Genuine Narrowing"*

Under the Eighth Amendment, States must adopt procedural protections that "assure consistency, fairness, and rationality in the evenhanded operation of the state law . . . to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed . . . ." *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (Joint Opinion of Stewart, Powell and Stevens, JJ.) (citations omitted), and "promote the evenhanded, rational, and consistent imposition of the death sentences under law." *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (Joint Opinion of Stewart, Powell and Stevens, JJ.) (citation omitted).

Central to this jurisprudence is the "constitutionally necessary narrowing function" of any death penalty scheme. *Pulley v. Harris*, 465 U.S. 37, 50 (1984). As this Court stated this past term: "Our precedents make clear that a State's capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty.' " *Arave v. Creech*, 113 S.Ct. 1534, 1542 (1993), *quoting Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (discussing narrowing requirement); *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring) ("[W]e have stressed the necessity of 'genuinely narrowing the class of persons eligible for the death penalty.' "); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. at 3060-3061 (1990) (Scalia, J., concurring).

This Court has stressed the dual function of "genuine narrowing:"

> To pass constitutional muster, a capital sentencing scheme must *'genuinely narrow'* the class of persons eligible for the death penalty and must *reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.*

Lowenfield v. Phelps, 484 U.S. at 244 (emphasis supplied), *quoting Zant v. Stephens*, 462 U.S. at 877. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." *Arave v. Creech*, 113 S.Ct. at 1542 (citing *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) and *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

"Genuine narrowing" serves its Eighth Amendment purpose by reducing the opportunities for the "freakish"

and "wanton" imposition of the death penalty in two ways. First, "narrowing" limits the class of murderers for whom the death sentence can be considered. By restricting eligibility, it assures that the death penalty cannot be imposed indiscriminately. *See, e.g., Walton v. Arizona,* 110 S.Ct. at 3090 (Stevens, J., dissenting) ("The risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons or eligible for the death penalty.") Second, "narrowing" limits the death penalty to those murderers whose culpability makes the death penalty particularly appropriate, insuring rationality by avoiding purely arbitrary sentencing. Not all murderers may be sentenced to death, and those who receive the death penalty must be rationally distinguishable from those who do not on grounds that reflect their respective degrees of culpability. As the Tennessee Supreme Court recognized in *Middlebrooks,* qualitative narrowing and not simply numerical narrowing is required. A state "must not only genuinely narrow the class of death-eligible defendants, but must do so in a way that reasonably justifies the imposition of a more severe sentence on the defendants compared to others found guilty of murder." *Middlebrooks,* 840 S.W.2d at 343 (App. to Cert. A 54-55); *See also Zant v. Stephens, supra; Arave v. Creech, supra.*

"Genuine narrowing" precludes the undifferentiated infliction of the death sentence upon the entire mass of murderers. *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). It restricts the death penalty in a manner that assures proportionality by requiring that only the most severe offenses, or the most deserving offenders, be considered for the most severe punishment. For, it would be the height of arbitrariness if less morally culpable murderers were always subject to the death penalty while more morally culpable murderers were systematically spared.

"Genuine narrowing" thus promotes the "rational and equitable administration of the death penalty" because it insures that the death penalty can be considered for only those offenders who demonstrate the most culpability or

who cause the most harm. *Boyde v. California,* 494 U.S. 370, 377 (1990) *quoting Franklin v. Lynaugh,* 487 U.S. at 181 (plurality). By insisting that the States draw meaningful, rational distinctions between those persons who receive the death penalty and those who do not, the Eighth Amendment narrowing requirement stands at the heart of an "evenhanded, rational, and consistent imposition of death sentences under law." *Jurek v. Texas,* 428 U.S. at 276.

2. *The Tennessee Death Sentencing Scheme Did Not "Genuinely Narrow"*

The manner in which a State narrows its class of death-eligible offenders, as well as the role of aggravating circumstances in that scheme, is purely a matter of state law within Eighth Amendment requirements. *See Stringer v. Black,* 503 U.S. ——, 112 S.Ct. at 1136-1138 (comparing Mississippi, Louisiana, and Georgia narrowing schemes); *Zant,* 462 U.S. at 876-880 (discussing narrowing function and role of aggravating circumstances in Georgia scheme).

Petitioner, its *amici,* the Tennessee Supreme Court, and Respondent do not disagree that narrowing must occur either through findings at the guilt-innocence phase of trial based on narrow definitions of death eligibility, or through findings of statutory aggravating circumstances at the penalty phase. *Lowenfield,* 484 U.S. at 246. As demonstrated below, Tennessee did not genuinely narrow at either stage, because: (1) Tennessee defined death eligible murder far more broadly than any State found to have narrowed at the definitional stage; and (2) Tennessee permitted Middlebrooks' jury to base his death sentence solely on the same broad felony-murder finding it had already made at the guilt-innocence determination phase.

a. *Tennessee Did Not Narrow at the Definitional Stage*

"It is clear that Tennessee has a broad definition of murder and has not narrowed at the definitional stage." *Middlebrooks,* 840 S.W.2d at 346, App. to Cert. A 62.

This conclusive interpretation of Tennessee law, *See Stringer v. Black, supra*; *New York v. Ferber*, 458 U.S. 747, 769 (1982), is itself clearly correct. As discussed in Section II. A, *supra*, Tennessee has broadly defined the class of death-eligible murderers to include all first-degree murderers. Tenn. Code Ann. § 39-2-202 (1982), *See* App. A. Tennessee has also defined first degree murder extremely broadly, having included in this definition all premeditated, deliberate murders, as well as all killings which occurred in the course of a long list of underlying felonies regardless of the *mens rea* of the killer or the accomplice towards the killing itself. Tenn. Code Ann. § 39-2-202 (1982).[16]

Given this broad definition of death-eligible murder, it is clear that the Tennessee system is vastly different from the Louisiana system which had "define[d] first-degree murder to include a narrower class of homicides" thereby limiting death-eligibility to highly aggravated, highly culpable murders. *Lowenfield*, 484 U.S. at 241. Louisiana required proof of both (1) a specific intent to kill or inflict great bodily harm, *and* (2) one of five specific situations characterizing the murder which distinguished it from other less culpable murders.[17] *Id.* at 242.

[16] Tennessee's first degree murder statute was virtually identical to the 1975 North Carolina first-degree murder statute which this Court has described as embracing "a broad category of homicidal offenses." *Woodson v. North Carolina*, 428 U.S. 280, 286-298 and n.4 (Joint Opinion of Stewart, Powell, Stevens, JJ.) N.C. Gen. Stat. § 17 (1975), *cited in Woodson*, 428 U.S. at 286: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . ." In *Woodson*, this Court made clear that a statute which makes all such homicides death-eligible differs greatly from a statute which "is limited to an extremely narrow category of homicide." *Id.* at 287 n.7.

[17] Louisiana's statute was similar to Texas' statute, which also provides narrowing at the definitional stage by requiring findings

Tennessee's pre-1989 all-encompassing definition of first degree murder stands in marked contrast to the narrow Louisiana definitions. Tennessee had specifically rejected both narrowly defining First Degree Murder and requiring proof of any *mens rea* for felony murder when it enacted its death sentencing scheme in 1977. (*See*, fn. 12, *supra*). Since *Furman*, Tennessee has, in fact, broadened its definition of first degree murder by adding several underlying felonies, including child abuse and kidnapping. (Compare Tenn. Code Ann. § 39-2402 (1955) and Tenn. Code Ann. § 39-2-202 (1982), *See* App. A. *See, also Middlebrooks, supra* at 344, 346, App. to Cert. A 56, A 62.

The role of statutory aggravating circumstances in Tennessee is, therefore, far different from Louisiana where they serve no narrowing function. ("The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally-required narrowing process . . .") *Lowenfield*, 484 U.S. 246. As the Tennessee Supreme Court has explained, the function of Tennessee's statutory aggravating circumstances is to narrow the class of death-eligible first-degree murderers to those upon whom a death sentence may actually be imposed. *Middlebrooks* at 344, App. to Cert. A 56. Thus, as the Tennessee Supreme Court found, *Lowenfield*'s reasoning is inapplicable to the Tennessee statutory scheme where First Degree Murder is sweepingly defined. *Id.* at 346, App. to Cert. A 62. Tennessee did not provide any narrowing at the guilt stage of the proceedings.

b. ***Tennessee's Felony Murder Aggravating Circumstance Did Not "Genuinely Narrow" in a Rational Principled Manner at the Penalty Phase***

The Tennesese capital sentencing scheme is similar to that of the Idaho scheme discussed in *Arave v. Creech*,

of: (1) an intentional killing; and (2) one of several other circumstances which made the intentional killing more culpable. Tex. Pen. Code § 19.03 (1974).

supra. Like Idaho, the "class of murderers eligible for capital punishment . . . is defined broadly" and includes "a sizable class of even those murderers who kill . . . without specific intent." Aggravating circumstances are employed to distinguish among members of that class. *Arave v. Creech*, 113 S.Ct. at 1542, 1543. In Tennessee, as in Idaho, "the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not." *Id*. at 1542; *See, Middlebrooks*, at 344, App. to Cert. A 56. Statutory aggravating circumstances in Tennessee, therefore, must also satisfy the test recently reaffirmed by this Court:

> [A] State's capital sentencing scheme also must "genuinely narrow the class of persons eligible for the death penalty" . . . [and w]hen the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide *a principled basis* for doing so (citations omitted.) (emphasis supplied)

Arave v. Creech, 113 S.Ct. at 1542.[18]

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[18] In *Arave*, this Court concluded that "[a]lthough the question is close, we believe the [utter disregard aggravating circumstance] satisfies this narrowing requirement." *Arave, supra*, at 1542. This Court concluded that the Idaho "utter disregard" aggravating circumstance, as defined by the Idaho Supreme Court, narrowed the class of death eligible murderers: "Given the statutory scheme, however we believe that a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold-blooded.' That is because some within the broad class of first-degree murderers *do* exhibit feeling." 113 S. Ct. at 1543. Not only did the "utter disregard" aggravating circumstance "genuinely narrow," it did so on a principled basis that reasonably distinguished those most culpable murderers: "Idaho similarly has identified the subclass of defendants who kill without feeling or sympathy as more deserving of death. By doing so, it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Id*. Idaho had complied with the Eighth Amendment because it had a principled basis for treating such defendants "as more deserving of the death penalty." *Id*.

While the question was close in Idaho, Tennessee's felony murder aggravating circumstance plainly goes beyond the constitutional borderline.[19] When it permitted Donald Middlebrooks to be sentenced to death on the basis of a felony murder aggravating circumstance which was coextensive with the felony murder *simpliciter* finding that underlay his first-degree murder conviction itself, Tennessee failed to identify a subclass of death-eligible defendants "as more deserving of death" because of their greater culpability.

Instead, the operation of the Tennessee scheme arbitrarily takes one of the two broad classes of murderers, defined by the Legislature as being equally culpable first degree murderers, and automatically makes that class subject to the death penalty without requiring proof of any additional element reasonably justifying a sentence of death. Tennessee has determined that proof of the fact that the killing occurred during the course of a felony will substitue for proof of premediation, malice, willfulness, and deliberation, so that the two crimes could be equally published. Tenn. Code Ann. § 39-2-202(b) (1982); *Middlebrooks* at 336, App. to Cert. at A 36-37; *see*, n. 14, *supra*.[20] But the Tennessee Supreme Court

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[19] The Tennessee statutory scheme under which Middlebrooks was sentenced was highly unusual in its treatment of felony-murder *simpliciter*, without more, as the basis for a death sentence. *See* Appendix B. Tennessee was the only state where proof of felony-murder *simpliciter* in and of itself would have automatically required the defendant to prove sufficient mitigating circumstances to overcome a presumption of death. As noted above, Tennessee itself no longer imposes this harsh result. Tennessee amended its statute to now require proof of "recklessness" and to require the state to prove that the aggravating circumstances outweigh the mitigating circumstances. Tenn. Code Ann. §§ 39-13-202, 204 (1991) (*See*, fn. 12 and 15 *supra*).

[20] Whatever the wisdom of this determination, the Legislature can decide, constitutionally, that felony murderers and premeditated murderers are morally equivalent for purposes of punishment. *See, Schad v. Arizona*, 501 U.S. ——, 111 S. Ct. 2491, 2503 (1991). The Tennessee Supreme Court so held below. *Middlebrooks*, at 336, 345, App. to Cert. A 36-37, 58.

also recognized that, once the Tennessee Legislature had made that determination, it was obliged to treat these two classes of "death-eligible" first-degree murderers even-handedly absent a rational penological basis for exposing one to death without additional proof of aggravation and not the other. The Tennessee Supreme Court could discern no such basis: "A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder." *Middlebrooks,* 840 S.W.2d at 345, App. to Cert. A 58.

The Tennessee Legislature has required proof of a statutory aggravating circumstance before the sentencer can consider imposition of the death penalty on a first-degree murderer. This is a genuine and meaningful requirement—a requirement of proof of something more than the first-degree murder itself—in the case of premeditated murderers. But it is an illusory and meaningless requirement in the case of the felony murderer when the felony murder aggravating circumstance is used to authorize a death sentence. *See, Engberg v. Meyer,* 820 P.2d 70, 90 (Wyo. 1991). Tennessee's statutory felony murder aggravating circumstance encompasses every single felony murderer and—by itself—authorizes the death penalty without proof of any additional element or fact by the state for every felony murderer. In stark contrast, there must be proof of an additional element or fact to make any member of the class of premeditated, malicious, willful, and deliberate first degree murderers subject to the death penalty. No automatic aggravating circumstance that "the murder was committed with premeditation, maliciousness, willfulness, and deliberation" parallels the one for felony murderers.

The question is not as Petitioner and its *amici* would have it, whether felony murder may be classed with premeditated murder as deserving capital punishment. There is little question under the Eighth Amendment that it can be.[21] But because there is no rational penological

[21] Petitioner and *amici* discuss at great length the fact that felony murder is an offense deserving severe punishment. That is not in dispute. The Tennessee Legislature agrees with them, having declared felony murder to be the equivalent of premeditated murder as the most severely punished crime in Tennessee. The Tennessee Legislature has not however declared a felony murderer to be worse than a premeditated, malicious, willful, and deliberate murderer. It has declared them to be the same—first degree murderers—for purposes of punishment under Tenn. Code Ann. § 39-2-202 (1982), as has the Tennessee Supreme Court. *Middlebrooks,* at 345, App. to Cert. A-58. This Court must take state statutory death penalty schemes as it finds them. *Pulley v. Harris,* 465 U.S. 37, 45 (1984).

basis for treating the class of *all* felony murderers more severely than the class of *all* premeditated murderers by making the former but not the latter automatically subject to the death penalty, the Eighth Amendment forbids this arbitrary result.[22]

"[P]unishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 2947 (1989). *See also Id.* at 2951. Consequently, an offender is not eligible for an enhanced punishment absent proof of an additional rational criterion which makes him or his offense more blameworthy or otherwise deserving of "a more severe sentence." *Lowenfield,* 484 U.S. at 244. In non-capital sentencing, therefore, a State may constitutionally enhance a punishment, so long as it establishes additional facts which demonstrate that the offense actually "inflict[ed] greater individual and societal harm"

[22] Petitioner also argues under *Payne v. Tennessee,* 501 U.S. ——, 111 S. Ct. 2597 (1991), that felony murderers should be punished more severely because they have caused more harm to society because they have committed another felony. The Tennessee Legislature has already taken into account the fact of the separate felony by using it to elevate Middlebrooks' actions to the equivalent of premeditated murder. Second, this is a policy decision that the Tennessee Legislature simply has not made. It has declared felony murder and premeditated murder to both be first degree murder under Tenn. Code Ann. § 39-2-202 (1982). The Tennessee Supreme Court has agreed with that decision. *Middlebrooks* at 345, App. to Cert. A-58. ("A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, deliberate murder.").

than the harm attaching to facts which constitute the elements of the offense. *Wisconsin v. Mitchell,* 508 U.S. ——, 113 S. Ct. 2194, 2201 (1993).

Just as non-capital enhancement demands proof of additional harm by a defendant, application of an aggravating circumstance to permit a sentence of "death, surely the most severe 'enhancement' of all," *Id.*, at 2200, demands proof of harm greater than that arising from mere proof of a death-eligible offense. Because there was no narrowing at the definitional stage, and because no additional rational criterion establishing greater culpability was proven by the felony-murder aggravating circumstance at the sentencing stage, no greater harm has been identified to reasonably justify enhancing the punishment of all felony murderers over all premeditated murderers.[23] This procedure, therefore, violated the Eighth Amendment.[24]

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[23] Vague aggravating circumstances are constitutionally infirm for this exact reason. When an aggravating circumstance is vague, it applies to all death-eligible defendants, thereby failing to provide a basis to rationally distinguish from among the entire class of defendants any defendant as being more culpable, and thus "more deserving of death." *Arave v. Creech,* 113 S.Ct. at 1543.

It is also for this reason that a State cannot make a defendant's gender, race or religion an aggravating factor, because neither race nor religion *ipso facto* enhances a defendant's blameworthiness for his offense. *Cf. Zant v. Stephens,* 462 U.S. at 885.

[24] The class of felony murderers who are "death eligible" in Tennessee is as broad as any class of felony murderers in the nation. (*See* discussion *supra,* at Section II.A.; App. B.) It includes not only the most culpable felony murderers—those who commit a felony and who intend to and do commit a murder in the course of the felony—it also includes those accomplices who had an intent to commit the underlying felony and no intent to commit murder itself and a significant number of murderers who would not have been eligible for the death penalty at the time of this Court's decision in *Furman.* (*See* discussion *supra* at Section II.A.) The class of felony murderers is so broad that there must also be some rational criterion for meaningfully distinguishing among the members of the class ("Our cases have recognized that not all felony murderers are of identical culpability, compare *Tison v. Arizona* . . ., with *Enmund v. Florida* . . ." (citations omitted)), *Schad v. Arizona,* 111 S. Ct. at 2503 (plurality).

Because of Tennessee's automatic aggravating circumstance for felony murderers, all felony murderers are treated as *more* culpable (morally *worse*) than all premeditated murderers for purposes of capital punishment. There is no reasonable basis upon which to treat all felony murderers as more culpable than all premeditated murderers, and the Tennessee Supreme Court has found no justification for such disparate treatment of first-degree murderers under Tennessee law. *Middlebrooks,* 840 S.W. 2d at 345, App. to Cert. A 58.

Since there is no rational penological ground for distinguishing the class of felony murderers from the class of premeditated, malicious, willful and deliberate murderers on the basis of the moral culpability of the offender, the felony murder statutory aggravating circumstance fails to reasonably justify subjecting one but not the other to capital punishment without proof of any further aggravation. The class of felony murderers thus made indiscriminately subject to the death penalty is itself larger than the class of death-eligible felony murderers at the time of *Furman. Compare* Tenn. Code Ann. § 39-2402 (1955) and Tenn. Code Ann. § 39-2-202(a) (1982), *see* App. A. It is not narrower. The sentencer is given no more guidance than the pre-*Furman* sentencer because the finding of the felony murder aggravating circumstance is compelled by the finding of first degree murder at the guilt-innocence phase of the trial. It is therefore present for consideration by every jury exercising its discretion to impose death for felony murderers. The opportunities for the arbitrary and capricious imposition of the death penalty are as rampant under this system as they were at the time of *Furman.*

Not only did Tenn. Code Ann. § 39-2-203(i)(7) fail to provide any "genuine narrowing" or "principled basis" upon which the jury could have distinguished among first degree murderers, it automatically and unconstitutionally placed "a thumb on death's side of the scale." *Stringer v. Black,* 112 S. Ct. at 1137. Tennessee is a weighing state. (See discussion *supra* at Section II. A.) The finding of the felony murder aggravating circumstance merely

repeated an element of the underlying offense of first degree murder that the jury had already found. This same element was then placed on the scale to be weighed by the jury. In addition, because Tennessee law required a defendant to prove that mitigation outweighed any aggravating circumstances, the felony murder aggravating circumstance automatically made death the presumptive sentence, unless and until the defendant could prove that he should live. Thus, at sentencing, *every* felony-murderer (including every accomplice) was required to convince a jury that he should live by proving mitigating circumstances sufficient to outweigh the aggravating circumstance. Conversely, even a principal premeditated murderer was not saddled with such an awesome burden absent proof by the state of an additional aggravating circumstance not encompassed by the definition of the underlying crime of first degree murder.

The Tennessee Supreme Court correctly held as a matter of Tennessee law, as a matter of Article I, § 16 jurisprudence, and as a matter of Eighth Amendment jurisprudence that the felony-murder aggravating circumstance, as applied to Donald Middlebrooks, failed to provide a rational basis for treating all felony murderers more severely than all premeditated murderers for purposes of capital punishment.[25]

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[25] The failure of the felony-murder *simpliciter* aggravating circumstance to genuinely narrow the class of death-eligible offenders is highlighted by the fact that Tennessee was the only jurisdiction in the nation to permit the draconian sentencing result which occurred here. Tennessee took the fact of a felony murder *simpliciter ipso facto* made that offense a death-eligible first-degree murder, *then* made that death-eligible offense automatically subject to the death penalty, and still further—by requiring the defendant to prove that mitigation outweighs aggravation before a life sentence can be imposed—made the death penalty the automatic sentence, absent proof of mitigation sufficient to outweigh the automatic aggravating circumstance. This procedure—unique to Tennessee, and since repealed—simply does not comport with the "evolving standards of decency that mark the progress of a maturing society." *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. at 2953 *quoting Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality). The former Tennessee scheme stands in isolation in permitting such a harsh sentencing procedure, which makes death the presumptive sentence for felony-murder *simpliciter*, *see* App. B.

"[T]his Court has acknowledged its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). In evaluating such evolving standards, this Court has primarily looked to the judgments of the State Legislatures. *See Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2975 (1989); *Penry*, 109 S.Ct. at 2953. Today, thirty-three (33) States and the District of Columbia do not permit capital punishment for the conviction of a party for felony murder *simpliciter* involving kidnapping. Eighteen (18) States would permit the death penalty as a possible punishment under such circumstances. Of those eighteen States, however, only three (3) would automatically elevate a party defendant to be "subject to the death penalty." Of those three States, none make the death penalty the presumptive sentence, because the jury is not instructed that it must impose the death penalty, absent mitigation.

Thus, not one of the States would permit the imposition of the death sentence in the manner in which Tennessee imposed it upon Donald Middlebrooks. Even today, Tennessee has evolved to the position that a felony murder *simpliciter* is no longer a criminal offense. Tennessee also no longer makes death the presumed punishment upon a finding of a statutory aggravating circumstance. The state must now prove that the statutory aggravating circumstance outweighs the mitigating circumstances. Tenn. Code Ann. § 39-13-204(g)(1)(B) (1992).

Petitioner and *amici* contend that this Court's rulings in *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) provide all of the narrowing that is required under the Eighth Amendment and that the Tennessee Supreme Court erred in requiring more. But nothing in *Enmund* or *Tison* overrules or obviates the "narrowing requirement" that has been reiterated in this Court's cases from *Zant* to *Arave*.[26] The

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[26] *Zant v. Stephens*, 462 U.S. at 878 ("they circumscribe the class of persons eligible for the death penalty."); *Barclay v. Florida*, 463 U.S. at 960, Stevens, J., concurring ("genuinely narrow[ing] the class of persons eligible for the death penalty"); *Blystone v. Pennsylvania*, 494 U.S. 299, 306-7 (1990) ("The presence of aggravating circumstances serves the purpose of limiting the class of death eligible defendants . . ."); *Lowenfield v. Phelps*, 484 U.S. at 244:

Enmund and *Tison* decisions establish a minimum level of culpability beneath which the death penalty may never constitutionally be imposed on accomplices to murder. The State of Tennessee cannot be " 'genuinely narrow[ing] the class of defendants eligible for the death penalty,' " *Arave*, 113 S.Ct. at 1542, *quoting Zant*, 462 U.S. at 877, by requiring proof of this constitutionally mandated minimum *mens rea* for the imposition of the death penalty on an accomplice, if indeed it has done even that.[27]

The function of the *Enmund/Tison* requirement and of the "narrowing" requirement are distinct, and both must be independently satisfied. *Enmund* and *Tison* exclude some murderers altogether from the potential reach of the death penalty. The "narrowing" requirement is focused on those that remain, in order to assure that the persons actually sentenced to die are selected from among them in an even-handed, nonarbitrary and rational manner.[28]

Petitioner and *amici* further argue that whether or not the felony murder aggravating circumstance itself actually

("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion.").

[27] As noted *supra*, fn. 2 & 12, the 1989 amendment adding recklessness as an element of first-degree felony murder was not in effect at the time of Middlebrooks' trial, and his jury was not instructed that it needed to make any finding as to intent other than that the offender intended to commit the underlying felony of kidnapping. There has been no finding at any stage thus far that Middlebrooks acted with the degree of intent necessary under *Enmund* and *Tison*.

[28] Petitioner and *amici*'s arguments also ignore this Court's Eighth Amendment jurisprudence on the role of aggravating circumstances. In *Maynard v. Cartwright*, *supra*, this Court affirmed the ruling of the Court of Appeals invalidating the sentence of death based on a vague aggravating circumstance. There was no question that Cartwright met the *Tison/Enmund* standard since he was the actual killer. *See also Walton v. Arizona*, *supra*; *Sochor v. Florida*, *supra*; *Arave v. Creech*, *supra*; *Stringer v. Black*, *supra*; *Lewis v. Jeffers*, *supra*, all of which involved murderers who clearly met the *Tison/Enmund* standard and where this Court considered the effect of aggravating circumstances in identfying those who were actually sentenced to die.

performs any narrowing function is irrelevant for Eighth Amendment purposes because the system as a whole provides adequate procedural protections to insure against the arbitrary and capricious imposition of the death penalty.[29] These arguments ignore the repeated holdings of

[29] The *amicus* brief of California's and 23 other states' Attorneys General implies that the finding of the heinous, atrocious and cruel aggravating circumstance in this case provides all of the narrowing required by the Eighth Amendment. *Amici* present a hypothetical case in which *only* the heinous, atrocious, and cruel aggravating circumstance was used to authorize a death sentence for a felony murderer, and they argue the supposed anomaly of allowing capital punishment in that situation but not in Middlebrooks'. Attorneys General's Brief, pp. 11-12.

This argument is specious because it misrepresents what the Tennessee Supreme Court held in *Middlebrooks*. The Tennessee Supreme Court did not hold that the death penalty was unavailable, or even inappropriate, for Donald Middlebrooks. It did not resentence Middlebrooks to life imprisonment but rather ordered "this case to be remanded for resentencing"—that is, for a new penalty proceeding "where the State will be free to reseek the death penalty if it so desires." *Middlebrooks*, 840 S.W.2d at 347. All that the Tennessee Supreme Court held is that, because the jury instructions at *this* penalty proceeding authorized the jury to sentence Middlebrooks to death if it found that the felony murder aggravating circumstance alone outweighed the circumstances in mitigation, "we are unable to conclude that the elimination of the [felony murder] aggravating circumstance . . . is harmless error beyond a reasonable doubt." *Id.* The whole purpose of its remand is to assure that, if Middlebrooks is to be sentenced to death, his death sentence *will* be rested upon a weighing of the heinous, atrocious and cruel aggravating circumstance against mitigation, *not* upon a weighing of the felony murder aggravating circumstance against mitigation.

Such a remand is based on long-standing Tennessee practice. The Tennessee Supreme Court has consistently refused to reweigh aggravation against mitigation or to hold that a jury's consideration of an invalid aggravating circumstance is harmless error when the jury might have based its death verdict solely on that aggravating circumstance. *State v. Moore*, 614 S.W.2d 348 (Tenn. 1981); *State v. Pritchett*, 621 S.W.2d 127 (Tenn. 1981). This practice is entirely consistent with the Eighth Amendment, *Sochor v. Florida*, 112 S. Ct. 2114, 2123 (1992), and reflects the Tennessee Supreme Court's view of its own responsibilities for insuring regularity in capital sentencing under both state law and the state and federal

this Court that in "weighing" states such as Tennessee, every aggravating circumstance upon which the jury was authorized to rely exclusively in imposing a death sentence upon a particular defendant must meet the "fundamental constitutional requirement" of "channeling and limiting the sentencer's discretion" so as to minimize "the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). *See, id.* at 365; *Stringer v. Black, supra*, 112 S. Ct. at 1139-1140; *Sochor v. Florida, supra*; *Espinosa v. Florida*, 505 U.S. ——, 112 S. Ct. 2926, 2928 (1992); *Zant v. Stephens*, 462 U.S. at 876 ("This conclusion rested, of course, on the fundamental requirement that *each* statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman* itself.") (emphasis supplied). In *Arave v. Creech, supra*, this Court addressed the constitutional narrowing function of the "utter disregard for human life" aggravating circumstance, despite the presence of four other statutory aggravating circumstances that were not constitutionally challenged.

The conclusion of the Tennessee Supreme Court that the invalidity of one aggravating circumstance submitted to Donald Middlebrooks' jury as a sufficient basis for a death sentence so infects his sentencing process as to require a resentencing is decisive. The Tennessee Supreme Court has decided that it does not "reweigh" or conduct harmless error analysis in this situation. It is irrelevant what other procedural protections may exist if the Tennessee Supreme Court finds that they have not sufficiently regulated the sentencing process in the particular case at bar.

Petitioner and *amici* contend that the Tennessee Supreme Court was mistakenly concerned with the fact that

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constitutions. On remand, if a properly instructed jury finds that Donald Middlebrooks' case is as deserving of the death penalty as the hypothetical case, nothing in the Tennessee Supreme Court decision below will preclude such a death sentence based upon "the aggravating circumstance of the murder being especially heinous, atrocious or cruel." *Middlebrooks*, 840 S.W.2d at 347.

the elements of the aggravating circumstance "duplicate" the elements of the underlying felony murder conviction. This contention confuses the reasoning of the Tennessee Supreme Court under Article I, § 16 of the Tennessee Constitution with the reasoning of its alternative Eighth Amendment holding. "Duplication," in and of itself, was found sufficient to offend Article I, § 16 of the Tennessee Constitution:

> Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, *see* Tenn. Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990), and we are of the opinion that Article I, § 16 of the Tennessee Constitution prohibits such duplication in capital sentencing as well.

State v. Middlebrooks, 840 S.W. 2d at 341, App. to Cert. A 49-50. However, in the Tennessee Supreme Court's "narrowing" analysis, "duplication" was not significant in its own right but only because its *result* was to permit the indiscriminate imposition of death sentences on felony murderers and not on premeditated murderers with no genuine narrowing:

> The perverse result of the felony murder narrowing device is even more troubling because the usual class of first-degree murderers is made up largely of two groups of defendants—felony murderers and premeditated murders. The only defendants who are eliminated by the felony murder narrowing device are those who kill with premeditation and deliberation—i.e., in cold blood—but not during the course of a felony. A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability.

Middlebrooks, supra at 345, App. to Cert. A 58. Thus, for Eighth Amendment purposes, the Tennessee Supreme Court was concerned with the unprincipled—"perverse"—result of duplication for purposes of enhancement, not the mere fact that the elements are duplicated. Its concern, quite properly, was with the lack of any "principled

basis," *Arave* v. *Creech*, 113 S. Ct. at 1542, for exposing felony murderers to a death sentence with no additional findings of aggravation that serve a genuine narrowing function.

CONCLUSION

Certiorari should be dismissed for want of jurisdiction because the decison below rests upon an adequate and independent state ground. Alternatively, the judgment of the Tennessee Supreme Court should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."

* * * *

United States Constitution, Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

* * * *

United States Constitution, Fourteenth Amendment: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* * * *

28 U.S.C. § 1257 (1988). State courts; certiorari:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is spe-

cially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

* * * *

Tennessee Constitution, Article I § 16: "Restrictions on bail, fines, and punishment. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Tennessee Code Annotated § 39-2-201 (1982) Murder generally: "If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

* * * *

Tennessee Code Annotated § 39-2-202 (1982) First-degree murder:

(a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or imprisonment for life.

(c) Murder in the first degree is a Class X felony.

* * * *

Tennessee Code Annotated § 39-2-203 (1982) Sentencing for first-degree murder:

(a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of

murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows * * *

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall:

(1) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(2) Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows * * *

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder;

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement;

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties;

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office;

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official; and

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons with the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empaneled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first-degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment.

Tennessee Code Annotated § 39-2-206 (1982) Punishment of accessory before the fact of first-degree murder: Any person tried and convicted as an accessory before

the fact of murder in the first degree shall be punished by life imprisonment or by death under the provisions of §§ 39-2-202 - 39-2-205 and said trial and sentence shall not depend on when or if the principal is convicted nor on the punishment actually imposed on said principal.

* * * *

Tennessee Code Annotated § 39-2402 (1955) Murder in the first degree. Every murder perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, or larceny, is murder in the first degree.

* * * *

Tennessee Code Annotated § 39-2402 (1975) Murder in the first degree. An individual commits murder in the first degree if:

(1) he commits a willful, deliberate, malicious and premeditated killing or murder;

(2) he commits a willful, deliberate, and malicious killing or murder, and:

(a) the victim is an employee of the department of correction having custody of the actor,

(b) the victim is a prison inmate in custody with the actor,

(c) the victim is known to the actor to be a peace officer or fireman acting in the course of his employment,

(d) the victim is a judge acting in the course of his judicial duties,

(e) the victim is a popularly elected public official,

(f) the offense is committed for hire; or

(g) the offense is committed while attempting to evade law enforcement officials;

(3) he hires another to commit a willful, deliberate, malicious and premeditated killing or murder, and such hiring causes the death of the victim; or

(4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

Tennessee Code Annotated § 40-35-114 (1991) "Enhancement factors.—If appropriate for the offense, enhancement factors, if not themselves essential elements of the offense as charged in the indictment, may include:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;

(3) The offense involved more than one (1) victim;

(4) The victim of the offense was particularly vulnerable because of age or physical or mental disability;

(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

(7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

(8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

(9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;

(10) The defendant had no hesitation about committing a crime when the risk to human life was high;

(11) The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant had previously been convicted of a felony that resulted in death or bodily injury;

(12) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim;

(13) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:

(A) Bail, if the defendant is ultimately convicted of such prior felony;

(B) Parole;

(C) Probation;

(D) Work release; or

(E) Any other type of release into the community under the direct or indirect supervision of the department of correction or local governmental authority;

(14) The felony was committed on escape status or while incarcerated for a felony conviction;

(15) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense; or

(16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

* * * *

Tennessee Code Annotated § 40-35-111 (1982) Enhancement factors.—If appropriate for the offense, enhancement factors, if not themselves necessary elements of the offense charged in the indictment or one of the criteria for establishing an especially aggravated offense may include:

(1) The defendant has a previous history of criminal convictions or criminal behavior;

(2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;

(3) The offense involved more than one victim;

(4) A victim of the offense was particularly vulnerable because of age or physical or mental disability;

(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

(7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

(8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

(9) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense; or

(10) The defendant had no hesitation about committing a crime when the risk to human life was high.

* * * *

Tennessee Rule of Criminal Procedure 12.3(b):

"Where a capital offense is charged in the indictment or presentment and the district attorney intends to ask for the death penalty, written notice thereof shall be filed not less than thirty (30) days prior to trial. . . . The notice shall specify those aggravating circumstances the State intends to rely upon at a sentencing hearing. . . ."

APPENDIX B

FELONY-MURDER SIMPLICITER INVOLVING UNDERLYING KIDNAPING: MAXIMUM PUNISHMENT FOR A PARTY TO THE OFFENSE

Not Murder Under State Law	Less Than Life to Life	Life With Parole Mandatory & Maximum	Life Without Parole Mandatory & Maximum	Death-Eligible Offense	Automatic Subject To Jury Discretion To Impose Death	Death Penalty Presumed, Unless Mitigation Proven
	[illegible][1]					
	[illegible]					
	[illegible]			Arizona[3]		
	Arkansas[4]					
				California[5]		
				Colorado[6]		
	Conn.[7]					
Delaware[8]						
	D.C.[9]				—	
					Florida[10]	
					Georgia[11]	
Hawaii[12]						
				Idaho[13]		
				Illinois[14]		
	Indiana[15]					
	Iowa[16]					
		Kansas[17]				
Kentucky[18]						
			Louisiana[19]			

Not Murder Under State Law	Less Than Life to Life	Life With Parole Mandatory & Maximum	Life Without Parole Mandatory & Maximum	Death-Eligible Offense	Automatic Subject To Jury Discretion To Impose Death	Death Penalty Presumed, Unless Mitigation Proven
	Maine[20]					
				Maryland[21]		
		Mass.[22]				
Michigan[23]						
	Minnesota[24]					
				Miss.[25]		
	Missouri[26]					
				Montana[27]		
				Nebraska[28]		
				Nevada[29]		
N. H.[30]						
	N. J.[31]					
				N. M.[32]		
	New York[33]					
				N. C.[34]		
	N. Dakota[35]					
Ohio[36]						
				Oklahoma[37]		
	Oregon[38]					
		Penn.[39]				

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No Murder Under State Law	Less Than Life to Life	Life With Parole Mandatory & Maximum	Life Without Parole Mandatory & Maximum	Death-Eligible Offense	Automatic Subject To Jury Discretion To Impose Death	Death Penalty Presumed, Unless Mitigation Proven
		R. I.[40]				
					S. C.[41]	
				S. Dakota[42]		
Tennessee (current)[43]						
						Tennessee (old)[44]
	Texas[45]					
	Utah[46]					
	Vermont[47]					
	Virginia[48]					
	Wash.[49]					
		W. Va.[50]				
	Wisconsin[51]					
				Wyoming[52]		

[1] Ala. Code § 13A-5-40 (capital murder requires intentional killing); *Russaw v. State*, 572 So. 2d 1288 (Ala. Cr. App. 1990); Ala. Code § 13A-6-2(a)(3) (felony murder simpliciter is murder); Ala. Code § 13A-5-6 (sentencing for offense of murder)

[2] Ak. Stats. § 11.41.100 (felony-murder is second-degree murder); Ak. Stat. § 12.55.125 (sentencing statute)

[3] Ariz. Rev. Stat §§ 13-1105(A)(2) (felony murder simpliciter is first-degree murder); 13-703 (no felony murder aggravating circumstance in capital sentencing)

[4] Ark. Code § 5-10-101(a)(2) (capital felony murder requires major felony and extreme indifference to value of human life); Ark. Code § 5-10-102(a)(1) (first-degree murder requires other felony and extreme indifference to value of human life); Ark. Code § 5-4-401 (sentencing for first-degree murder)

[5] Cal. Penal Code § 187(a) (murder requires malice); *See however* Cal. Penal Code § 190.2(a)(17)(ii) (felony murder kidnaping special circumstance); Cal. Penal Code § 190.2(c) (to apply felony murder aggravating circumstance to accomplice who did not kill, State must prove intent to kill); Cal. Penal Code § 190.2(b) (to apply felony murder aggravating circumstance to actual killer, no intent to kill need be proven); *People v. Anderson*, 285 Cal. Rptr. 523 (felony-murder simpliciter is first-degree murder); Cal. Penal § 190.3 (jury to impose death if it concludes that aggravation outweighs mitigation)

[6] Col. Rev. Stat. § 18-3-102(1)(b) (felony murder simpliciter is first-degree murder); Col. Rev. Stat. § 16-11-103(5)(d) (felony murder aggravating circumstance requires intent to kill)

[7] Conn. Gen Stat. § 53a-54b, § 53a-54a (felony murder is not a capital felony; capital felony requires intent to kill); Conn. Gen. Stat. § 53a-54c (felony murder simpliciter is murder); Conn. Gen. Stat. §§ 53a-45, 53a-35a (murder punished by 25 years to life)

[8] Del. Code Ann. § 636 (felony first-degree murder requires major felony and recklessness); Del. Code Ann. § 635 (felony second-degree murder requires lesser felony and criminal negligence); *Id.* (sentence for felony-second degree murder at least 10 years).

[9] D.C. Code § 22-2401 (felony-first degree murder requires killing in course of felony without purpose to cause death); D.C. Code § 22-2404 (sentencing for murder)

[10] Fla. Stat. § 782.04(1)(a)(2) (felony-murder simpliciter is capital felony); Fla. Stat. § 921.141(5)(d) (kidnaping felony murder aggravating circumstance); Fla. Stat. § 921.141(3) (sentence imposed by judge after weighing aggravating circumstances and mitigating circumstances)

[11] O.C.G.A. § 16-5-1(c), (d) (felony-murder simpliciter punishable by life imprisonment or death); O.C.G.A. 17-10-30 (jury given discretion to impose death sentence if it finds one aggravating circumstance)

[12] Haw. Rev. Stat. §§ 707-701, 707-701.5 (murder statutes)

[13] Id. Code § 18-4003(d) (felony-murder is first-degree murder); *State v. Windsor*, 110 Idaho 410 (1985) (felony first-degree murder does not require intent to kill); Id. Code § 19-2515(g)(7) (felony-murder aggravating circumstance requires intent to kill)

[14] 720 Ill. Comp. Stat. Ann. § 9-1(a)(3) (causing death in course of forcible felony is first-degree murder); 720 Ill. Comp. Stat. Ann. § 9-1(b)(6)(b) (felony murder aggravating circumstance requires intent to kill and actual killing by accused)

[15] Burns Ind. Code § 35-42-1-1(2) (killing in course of major felony is murder and subject to death penalty); Burns Ind. Code § 35-42-1-4 (killing in course of minor felony is involuntary manslaughter); Burns Ind. Code § 35-50-2-9(b)(1) (felony-murder aggravating circumstance requires intentional killing)

[16] Ia. Code §§ 707.1, 707.2.2 (first-degree felony murder requires malice); Ia. Code § 707.5 (felony murder sentencing statute)

[17] Ks. Stat § 21-3401(a)(3) (murder is killing in course of felony); Ks. Stat. § 21-4501 (sentencing for murder).

[18] No felony murder in Kentucky. *See* K.R.S. § 507.020 (1992)

[19] La. Rev. Stat. § 14:30.1.A.2 (felony murder simpliciter is second degree murder); La. Rev. Stat. § 14:30.1 (punishment for second degree murder)

[20] 17A Me. Rev. Stat. § 202.1 (felony murder simpliciter statute) 17A Me. Rev. Stat. § 1251 (sentencing statute)

[21] Md. Code Art. 27 §§ 407-410 (felony murder is first-degree murder); *Evans v. State*, 28 Md. App. 640 (1975) *aff'd* 278 Md. 197 (1976) (felony murder does not require intent to kill); *See* Md. Code Art. 27 § 413(d)(10) (felony-murder aggravating circumstance does not include kidnapping as underlying felony)

[22] Mass. Gen. Laws Ch. 265 § 1 (felony murder is murder); Mass. Gen. Laws Ch. 265 § 2 (felony murder punishable by life imprisonment)

[23] *People v. Aaron*, 409 Mich. 672 (1980) (felony-murder simpliciter abolished)

[24] Minn. Stat. Ann. § 609.19(2) (felony murder simpliciter for major felonies other than criminal sexual conduct)

[25] Miss. Code § 97-3-19 (killing in course of major felony is capital murder, killing in course of minor felony is simple murder). While murder in course of felony is aggravating factor for capital murder, jury must find that defendant killed, attempted to kill, intended to kill, or contemplated the use of lethal force. Miss. Code § 99.19-101(5)(d), (7).

[26] Vernon's Ann. Mo. Stats. § 565.021.1(2) (felony murder simpliciter is second-degree murder); Vernon's Ann. Mo. Stats. § 558.011 (sentencing provision, 10-30 years or life)

[27] Mont. Code Ann. § 45-5-102 (causing death in course of felony is deliberate homicide); Mont. Code Ann. § 46-18-303 (no felony-murder aggravating circumstance for deliberate homicide)

[28] Neb. Rev. Stat § 28-303 (felony murder simpliciter is first-degree murder); *State v. Rust*, 223 Neb. 150 (1986) (felony murder does not require intent); Neb. Rev. Stat. § 29-2523 (no felony-murder aggravating circumstance)

[29] *Compare* Nev. Rev. Stat. § 200.010 (murder requires malice) *and* § 200.030(1)(b) (murder in course of felony is murder in the first-degree) *with Ford v. State*, 660 P.2d 992 (Nev. 1983) (felony-murder requires no mens rea); Nev. Rev. Stat. § 200.033.4 (felony-murder aggravating circumstance requires that the defendant have killed or have knowledge that killing would occur)

[30] N.H. Stat. Ann. § 630:1-b (felony murder requires recklessness or extreme indifference to value of human life)

[31] N.J. Stat. Ann. § 2C:11-3.a(3) (felony murder simpliciter is murder); N.J. Stat. Ann. § 2C:11-3.b (sentence for felony-murder is 30 years to life)

[32] N.M. Stat. § 30-2-1.A(2) (killing in course of felony is capital felony); N.M. Stat. § 31-20A-5.B (felony-murder aggravating circumstance requires intent to kill in course of kidnaping or criminal sexual contact with minor)

[33] N.Y. Penal Code § 125, § 125.25.3 (felony murder simpliciter is second degree murder); N.Y. Penal Code § 70.00 (sentencing for second degree murder)

[34] N.C. Gen Stat. § 14-17 (felony murder is first-degree murder); *State v. Cherry*, 298 N.C. 86 (1979) (felony-murder aggravating circumstance cannot be applied to felony-murder conviction)

[35] N. D. Cent. Code § 12.1-16.01.1.C (felony murder is Class AA felony); N. D. Cent. Code § 12.1-32-02 (sentencing statute)

[36] Oh. Rev. Code Ann. § 2903.01 (aggravated murder requires intent to kill); Oh. Rev. Code § 2903.04(A) (killing in course of felony is involuntary manslaughter)

[37] Ok. Stat. Ann. Tit. 21 § 701.7.B (felony murder simpliciter is first-degree murder); Okla. Stat. Ann. Tit. 21 § 701.12 (no felony murder aggravating circumstance)

[38] Ore. Rev. Stat. §§ 163.095(d), 163.115(1)(b) (felony murder simpliciter is simple murder); Ore Rev. Stat. § 63.115(3)(a) (murder punishable by 10 years to life)

[39] Purdon's Pa. Stat. Tit. 18 § 2502 (felony-murder simpliciter is second-degree murder); Purdon's Pa. Stat. Tit. 18 § 1102(b) (sentencing for second-degree murder)

[40] Gen. Laws R.I. § 11-23-1 (killing with malice is murder; murder in course of felony is first-degree murder); Gen. Laws R.I. § 11-23-2 (sentencing statute)

[41] S.C. Code § 16-3-10 (murder requires malice) *But see State v. Yates*, 280 S.C. 29, 310 S.E.2d 85 (1982) (acknowledging common law rule of felony murder); S.C. Code § 16-3-20 (jury must consider aggravation and mitigation in assessing sentence)

[42] S.D. Cod. Laws § 22-16-1, -2, -4 (killing in course of major felony is first-degree murder, killing in course of minor felony is second-degree murder); S.D. Cod. Laws § 23A-27A-1 (no felony murder aggravating circumstance)

[43] Tenn. Code Ann. § 39-13-202 (1989) (felony murder requires reckless killing)

[44] Tenn. Code Ann. § 39-2-203(f), (g) (1982); *See State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992).

[45] Tex. Penal Code § 19.02 (felony murder simpliciter is simple murder)

[46] Utah Code § 76-5-202, 203 (felony-murder simpliciter is second degree murder); Utah Code § 76-3-203 (sentencing provisions)

[47] Vt. Code Tit. 13 § 2301, 2311 (killing in course of felony is first-degree murder); Vt. Code Tit. 13 § 2303 (sentencing provisions for first-degree murder)

[48] Va. Code § 18.2-32 (felony-murder simpliciter is first-degree murder, not capital murder)

[49] Wash. Code § 9A.32.030(1)(C) (felony murder simpliciter is first-degree murder, not aggravated murder)

[50] W. Va. Code § 61-2-1 (murder in course of felony is first-degree murder); W. Va. Code § 61-2-2 (sentence for murder is life imprisonment)

[51] Wis. Crim. Code §§ 940.03 (felony murder simpliciter an offense punishable by 20 years to life)

[52] Wyo. Code § 6-2-101 (killing in course of felony is first-degree murder); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991) (felony murder aggravating circumstance cannot be applied to felony murder conviction)

No. 92-989

In The

Supreme Court of the United States

October Term, 1993

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT

I. THE JUDGMENT OF THE TENNESSEE SUPREME COURT DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND 1

II. THE TENNESSEE FELONY MURDER AGGRAVATING CIRCUMSTANCE "GENUINELY NARROWS THE CLASS" OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY IN A "RATIONAL AND PRINCIPLED MANNER" .. 6

III. IN ANY EVENT, THE TENNESSEE STATUTE IS NOT INVALID AS APPLIED TO RESPONDENT BASED ON THE "COMPARATIVE JUSTICE" OF TREATING "SIMPLE" FELONY MURDERERS AS AUTOMATICALLY DEATH-ELIGIBLE, SINCE AN ADDITIONAL VALID AGGRAVATOR WAS FOUND TO BE PRESENT IN HIS CASE 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES CITED

Arave v. Creech, 507 U.S. ___, 113 S. Ct. 1534 (1993) ..7, 13

Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985) 5

Godfrey v. Georgia, 446 U.S. 420 (1980).....7, 13

Lowenfield v. Phelps, 484 U.S. 231 (1988) 5, 6, 7, 8

Michigan v. Long, 463 U.S. 1032 (1983).....1, 2, 3, 6

State v. Branam, No. 03S02-9103-CR-00020, 1993 WL 209577 (Tenn. May 24, 1993)..... 10

State v. Smith, 755 S.W.2d 757 (Tenn. 1988) 6

Tison v. Arizona, 481 U.S. 137 (1987)..... 9, 10, 11, 12

Walton v. Arizona, 497 U.S. 639 (1990) 11

STATUTES

Tenn. Code Ann. § 40-35-111 (1982) 4

Tenn. Code Ann. § 40-35-114 (1990) 4

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE JUDGMENT OF THE TENNESSEE SUPREME COURT DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondent begins his argument with an extended effort to persuade the Court, as he tried to do at the certiorari stage, that the Court lacks jurisdiction because the Tennessee Supreme Court relied on an adequate and independent state ground for its decision. This argument is without merit. Under *Michigan v. Long*, 463 U.S. 1032 (1983), this Court has jurisdiction unless the independence of the state law ground – here, Article I, § 16, of the Tennessee Constitution – is "clear from the face of the

opinion." *Long*, 463 U.S. at 1041. That standard plainly is not met.

This Court need only read the portion of the majority opinion concerning the issue presented (Part III) to see that nowhere does the Tennessee Supreme Court ever say, much less make "clear," that its holding under state law is independent of its view of federal law. To the contrary, every mention of the Tennessee Constitution is either directly accompanied by a reference to the Eighth Amendment or is immediately followed or preceded by the state supreme court's discussion of its view of Eighth Amendment law as part of its explanation of why it is construing its own constitution as it does. Moreover, on each occasion where the court states its holding, it relies jointly on the state and federal constitutions,[1] omitting any declaration of the independence of the two grounds. This omission is particularly telling after *Michigan v. Long* made clear the importance of such a declaration, and in light of the state court's clear recognition in Part II of its opinion that state law can in fact be independent of federal law. The opinion thus strongly suggests *dependence*, not independence, of state and federal law.

In any event, at a minimum, this is precisely the sort of situation that the rule in *Michigan v. Long* was designed

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[1] "We hold that . . . [Tennessee's statute] . . . does not narrow the class of death eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution. . . ." Pet. App. A62-63; "We, therefore, reverse the sentence on the grounds that the aggravating circumstance . . . is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution. . . ." Pet. App. A3.

to address. That rule fosters accountability in state court rulings; by requiring clarity in the ground of decision, *Long* enables erroneous federal law holdings to be corrected by this Court and any independently controlling state law interpretations to be clearly identified as such, permitting them to be altered by the people of the state (if they desire) through proper legislative or constitutional processes. In this case, failure by this Court to reach and decide the federal law issue would defeat accountability by leaving the true basis for the state court's decision in a muddle.

Respondent offers, at bottom, only three arguments against this conclusion, but none of the arguments are remotely persuasive. To begin with, respondent points to the fact that two members of the three-judge majority wrote a separate concurring opinion in which, briefly referring to the majority's ruling on the present issue, they mention only state law. *See* Pet. App. A74. Respondent asks this Court to infer that the Tennessee Constitution is the "narrowest basis for a judgment on which a majority agree, and must therefore be considered the basis for the Tennessee Supreme Court's judgment". Brief of Respondent, at p. 21. This argument fails both in its conclusion and in its premise.

First, even if respondent's reading of the concurring opinion were correct, the proper inference would be just the opposite of what respondent suggests: The majority opinion establishes the basis for the essential third vote; and that opinion, as explained, must be understood as relying on the interdependence of state and federal law, making federal law the controlling factor in the decision. Thus, the predicate of "independence" for jurisdictional

purposes – that the state court clearly reached its decision on grounds that would not be altered by any ruling this Court might render on federal law – is missing. Second, and in any event, respondent has overread the concurring opinion. The concurring judges, though their brief mention of this issue refers only to the Tennessee Constitution, never say that their view of the meaning of the Tennessee Constitution is independent of federal law. Indeed, any such statement would be surprising in light of their joinder of the majority opinion, which points toward dependence on federal law. Thus, the premise of respondent's first argument is itself wrong.

Respondent also places heavy reliance on the following sentence in the state court's opinion: "Our legislature, however, has seen fit to prohibit duplication by statute in non-capital sentencing, *see* TENN. CODE ANN. § 40-35-111 (1982) and § 40-35-114 (1990), and we are of the opinion that Article I, § 16 of the Tennessee Constitution prohibits duplication in capital sentencing, as well." Pet. App. A49-50, *Quoted* in Brief of Respondent, at p. 21. This sentence, however, cannot establish the independence of the court's state law holding from federal law. Respondent has simply ignored the dispositive issue: *why* the majority construed state law as it did – in particular, whether the state law construction rested at all on the court's view of federal law. The analysis that follows the quoted language establishes just such interdependence, for that discussion is concerned primarily with the court's interpretation of federal law. Thus, far from making *independence* "clear," the "structure and wording" of the opinion below (Respondent's Brief at p. 21), strongly suggest the opposite.

The quoted reference to the state law bar on duplication in non-capital sentencing cannot support an inference of independence (much less a "clear" inference) for another reason as well. As we explain below, the state court's reversal of respondent's sentence does not in the end turn on any objection to duplication as such. The court's ruling therefore cannot be understood as independently resting on state law simply because the court referred to (an ultimately irrelevant) state law bar on duplication in another context.

Respondent's final contention is that the state court's citation to *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), and discussion of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), demonstrate that the judgment is based on state law independent of federal law. This argument is likewise incorrect. The state court's discussion of *Collins* serves merely to explain the history of the Tennessee Supreme Court's consideration of this issue in earlier cases. In no way do the references to *Collins* imply the independence of the state law and federal law holdings. The court then immediately proceeds to discuss *Lowenfield*, stating that "*Lowenfield* is inapposite and provides no rationale for constitutionality under the Tennessee Constitution." Pet. App. A62. What is telling is that the court found that the statute presented in *Lowenfield* was so different from the Tennessee statute that *Lowenfield* had to be distinguished on the facts, *not* on the basis that Tennessee law is independent of federal law. The court's omission of a plain statement of independence at that point in its opinion is powerful confirmation of the *dependence* of the state law rationale on federal law. It reconfirms that the opinion

lacks any clear indication of independence as required by *Michigan v. Long*.

Further, in *State v. Smith*, 755 S.W.2d 757, 768 (Tenn. 1988), the Tennessee Supreme Court held that there was no constitutional violation presented by this use of a felony murder aggravating circumstance in a felony murder case. In this case, the court overruled *Smith*, basing its action on its substantive analysis in *Lowenfield* and the erroneous conclusion that *Lowenfield* was inapposite not on the basis that Tennessee law is independent of federal law. This once again demonstrates the dependence of state law analysis on federal law analysis central to the court's decision on this issue.

II. THE TENNESSEE FELONY MURDER AGGRAVATING CIRCUMSTANCE "GENUINELY NARROWS THE CLASS" OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY IN A "RATIONAL AND PRINCIPLED MANNER".

On the merits, respondent seeks to defend the holding of the Tennessee Supreme Court that the use of the felony murder aggravating circumstance in a felony murder case violates the Eighth Amendment. Although it is difficult to determine the precise basis for this holding from either the majority opinion below or respondent's brief, a careful analysis reveals that the Tennessee felony murder aggravating circumstances satisfies all of this Court's Eighth Amendment requirements.

Respondent, and the Tennessee Supreme Court, argue that, in felony murder cases, the Tennessee felony murder aggravating circumstance does not "genuinely

narrow" the class of death-eligible murderers for two reasons: first, because it is overbroad; second, because it "duplicates" an element of the crime of felony murder. *See* Pet. App. A49-50, A62; Brief of Respondent at p. 49. They also contend that the felony murder aggravating circumstance does not narrow the class of murderers in a "rational" and "principled way." *See* Pet. App. A55; Brief of Respondent at p. 38-45. We will address each of these arguments in turn.

First, the Tennessee felony murder aggravating circumstance unquestionably provides "genuine narrowing" of the class of death-eligible murderers and is therefore not overbroad. Unlike the "outrageously or wantonly vile, horrible or inhuman" aggravator in *Godfrey v. Georgia*, 446 U.S. 420 (1980), or the "cold-blooded and pitiless" aggravator in *Arave v. Creech*, 507 U.S. ___, 113 S. Ct. 1534 (1993), there can be no plausible claim that the Tennessee aggravating circumstance applies to *all* murders. On the contrary, the felony murder aggravator clearly identifies a sub-set of murderers to be treated as death-eligible, and thus provides "genuine narrowing."

Second, the fact that the Tennessee felony murder aggravating circumstance may "duplicate" one of the elements of the crime of felony murder is without constitutional significance. In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), this Court held that "duplication," or "double-counting," does not violate the Eight Amendment. Nor can the court below or respondent convert "duplication" into a constitutional issue by claiming that it defeats the "genuine narrowing" requirement; this claim is also foreclosed by *Lowenfield*, in which a similar "bootstrapping"

effort was rejected by this Court. *Lowenfield*, 484 U.S. at 244-46.

The only remaining question, then, is whether the Tennessee felony murder aggravating circumstance narrows the class of death-eligible murderers in a "rational and principled manner." In the abstract, there can be no doubt – and respondent does not contest – the rationality of the felony murder aggravating circumstance. With respect to *any* killing (whether intentional or not), the fact that the killing occurred during the course of an intentional, serious felony adds significantly to *both* the harm caused to society *and* the defendant's overall culpability. Thus, the Tennessee Legislature's choice to make felony murder an aggravating circumstance for death penalty purposes is clearly "rational and principled."

Nevertheless, the state court and respondent both find the felony murder aggravator to be "irrational," "unprincipled," and "arbitrary" on the ground that it automatically renders death-eligible some persons who are far less culpable than even the least culpable intentional murderer, for whom death eligibility depends on the finding of another aggravating circumstance. But this "comparative justice" argument ignores how the Tennessee death penalty scheme does, and must, actually operate. The only felony murderers who are, or can be, singled out as death-eligible in Tennessee are those whose culpability *for the killing itself* is so great that it comes very near (or is the same as) the culpability of an intentional killer. For such persons, the simultaneous commission of an intentional, serious felony provides more than enough "rational" and "principled" additional

justification – there is additional culpability and additional harm to society – to make death an appropriate punishment, even when compared to the category of intentional murderers.

The fundamental flaw in respondent's argument is its failure to acknowledge the crucial fact that the Tennessee death penalty scheme does not – and *cannot* – render all felony murderers subject to the death penalty. Since this Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987), those felony murderers who do not kill, attempt to kill, intend to kill, or act as major participants in a serious felony while exhibiting reckless indifference to the value of human life, *cannot* – in Tennessee or anywhere else in the United States – be made subject to the death penalty. Tennessee prosecutors, Tennessee trial judges, and the justices of the Supreme Court of Tennessee are all well aware of their obligations to ensure that this federal constitutional mandate is observed in Tennessee. Respondent nowhere asserts that Tennessee felony murderers are being sentenced to death in violation of *Tison*.[2] Nor could such a claim be reasonably advanced, because, as the state court noted recently in setting aside a death sentence on the ground that it was disproportionate, only *one* person convicted of felony murder on Tennessee's death

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[2] Respondent does note that no *Tison* finding has been made in this case (*see* Brief of Respondent, at p. 46 n.27), perhaps hoping to imply that there might be some doubt as to whether the respondent meets the *Tison* culpability standard. Respondent, however, has never sought to challenge his death sentence on the ground that it might violate *Tison*, doubtless because evidence contained in the record would make such a claim totally unsupportable.

row did not actually kill the victim himself – and that individual "handed the killer the murder weapon, nodded to him to shoot the victim, who was seated in front of the killer, and shot the victim's body afterwards." *State v. Branam*, No. 03S02-9103-CR-00020, 1993 WL 209577, at *10 (Tenn. May 24, 1993) (Drowota, J., concurring). Clearly, the Tennessee courts take seriously their mandate under *Tison*.

Because *Tison* prohibits as a matter of federal constitutional law the execution of those felony murderers who personally are less than fully culpable for the death of their victim, the bulk of respondent's "narrowing" argument is completely misplaced. In the real world of Tennessee death sentencing, the only felony murderers who can lawfully receive the death penalty are those who satisfy *Tison*'s personal culpability standard. That standard requires them to exhibit culpability for the killing itself at a level nearly equal to that of an intentional murderer. Given that degree of culpability for the killing itself, the additional harm caused by the commission of a serious felony (with additional culpability for that felony) *does* rationally identify a sub-class of all first-degree murderers for whom the death penalty is particularly appropriate.

Accordingly, Tennessee has rationally concluded that any slight lessening of culpability for the killing is outweighed by the extreme societal harm (and culpability for the additional felony). Further, by making the killing of a victim during the course of a felony an aggravating circumstance, the Legislature has given felons a necessary special incentive not to kill their felony victims or other witnesses to their crimes. In short, for the relevant

post-*Tison* class of personally culpable death eligible felony murderers, it is perfectly rational and principled for the Tennessee Legislature to conclude that *all* such felony murderers should be subject to the death penalty, even though some premeditated murderers are not.

Respondent makes only two brief attempts to answer this central point. First, he claims that the "narrowing" function must be performed either at the guilt phase or at the sentencing phase of the capital trial. *See* Brief of Respondent, at p. 35. But, as we noted in our opening brief (at 15), this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990), establishes that the narrowing function need *not* be performed at trial at all, but may be performed even by a state supreme court upon appellate review if it is pursuant to a non-vague aggravating circumstance. After all, the narrowing requirement is merely a means to ensure systemically rational, principled, and non-arbitrary death sentencing. Because Tennessee's death penalty scheme, viewed in its entirety, is rational and principled in its treatment of the relevant post-*Tison* felony murders, it is immaterial whether the narrowing function is performed at the guilt phase of the trial, at the sentencing phase, or even upon appellate review.

Respondent's second attempt is the bald assertion, at page 46 of his brief, that the *Tison* requirement and the narrowing requirement are "distinct, and both must be independently satisfied." While these two requirements are certainly "distinct," no decision of this Court suggests that they must be independently satisfied. Rather, in the particular context of this case, both requirements serve the same desired end of ensuring that the death penalty is imposed in a rational and principled manner. In any

event, respondent has raised no issue as to the *Tison* requirement. *See, supra,* p. 9. The only remaining question, then, is whether once *Tison* is satisfied, the Tennessee scheme rationally narrows the class of persons eligible for the death penalty. For the reasons set forth above, Tennessee's statute readily passes that test.

III. IN ANY EVENT, THE TENNESSEE STATUTE IS NOT INVALID AS APPLIED TO RESPONDENT BASED ON THE "COMPARATIVE JUSTICE" OF TREATING "SIMPLE" FELONY MURDERERS AS AUTOMATICALLY DEATH-ELIGIBLE, SINCE AN ADDITIONAL VALID AGGRAVATOR WAS FOUND TO BE PRESENT IN HIS CASE.

Respondent's complaint now appears to reduce to the claim that the Tennessee felony murder aggravating circumstance is not "rational and principled" because it renders all felony murderers automatically death-eligible, while intentional murderers are not automatically death-eligible. In light of the actual operation of Tennessee's death penalty scheme, this claim must fail on the merits. In addition, however, *even if* the claim were meritorious, respondent would not be entitled to invalidate *his* sentence on this ground because he is not a member of the class of persons alleged to be treated unfairly, namely, felony murderers eligible for the death penalty without any other aggravating circumstance.

Respondent's core argument about the unconstitutionality of the felony murder aggravating circumstance is unprecedented in the Eighth Amendment decisions of this Court. Respondent does not contend that the felony

murder aggravator is "vague." *Contrast, e.g., Godfrey v. Georgia,* 446 U.S. 420 (1980). Nor does he contend that it is so broad that it applies to *all* murders. *Contrast, e.g., Arave v. Creech,* 507 U.S. ___, 113 S. Ct. 1534 (1993). Nor does he contend that the aggravator is itself "irrational" or "unprincipled." *Contrast, e.g., Godfrey,* 446 U.S. at 434. n.16, (discussing gruesomeness of murder). These contentions, this Court's decisions suggest, can invalidate the sentence of *any* defendant whose death sentence rests on such an aggravating circumstance, since these defects in aggravating circumstances undermine *any* possible value it might have in the sentencing process.[3]

Here, by contrast, respondent does not challenge the validity of the felony murder aggravating circumstance on its own terms. Instead, he makes only a "comparative injustice" argument, claiming that the felony murder aggravator renders some persons automatically death-eligible (felony murderers with no additional aggravators) even though allegedly more culpable intentional murderers are not automatically death-eligible (intentional murderers require an additional aggravator). But respondent is not *even a member* of the class of persons he alleges to be treated unfairly. Rather, in his case, the sentencer found *another valid* aggravating circumstance to be present. Thus, even if there is an unconstitutional "comparative injustice" claim, that defect does not apply

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[3] Of course, a state court might still find the presence of such an invalid aggravating circumstance "harmless," if another valid aggravating circumstance was found to be present.

to respondent's case. For this reason, too, this Court should reverse the decision below.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be reversed.

Respectfully submitted,

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QUESTION PRESENTED

Whether, in a capital felony murder prosecution, the Eighth Amendment prohibits the sentencer from considering as an aggravating circumstance that the murder was committed in the perpetration of a felony?

TABLE OF CONTENTS

Page

INTEREST OF *AMICI* 1

STATEMENT OF FACTS AND PROCEEDINGS 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. The Tennessee Supreme Court Majority Improperly Applied the Eighth Amendment Narrowing Requirement Under this Court's Precedent 7

A. Overview: The Felony Murder Rule and Capital Punishment 7

B. The Eighth Amendment Narrowing Function and the Purported "Double Counting" 10

C. This Case is Controlled by *Jurek* and *Lowenfield* 11

II. Alternatively, the Eighth Amendment Narrowing Function And Individualized Sentencing Requirement Are Fulfilled By Other Provisions in the Tennessee Capital Sentencing Statute 21

A. Systemic Assessment 22

B. Legislative Prerogative 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Arave v. Creech, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) 22

Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), *cert. denied*, 497 U.S. 1032 (1990) 19, 24, 28

Blystone v. Pennsylvania, 494 U.S. 299 (1990) .. 16, 24, 25

Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988) 18, 19

Cabana v. Bullock, 474 U.S. 376 (1986) 8, 27, 28

Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985) 14

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), *cert. denied*, 496 U.S. 929 (1990) 19

Enmund v. Florida, 458 U.S. 782 (1982) ... 7, 8, 9, 10, 24, 28

Furman v. Georgia, 408 U.S. 238 (1972) 10, 18

Giarratano v. Procunier, 891 F.2d 483 (4th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990) 20

Gregg v. Georgia, 428 U.S. 153 (1976) .. 10, 22, 23, 26, 28

Johnson v. Dugger, 932 F.2d 1360 (11th Cir.), *cert. denied*, 112 S.Ct. 427 (1991) 19

Jurek v. Texas, 428 U.S. 262 (1976) ..... *passim*

Lockett v. Ohio, 438 U.S. 586 (1978) 25

Lockhart v. Fretwell, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) 14

Lowenfield v. Phelps, 484 U.S. 231 (1988) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

McKenzie v. Risley, 842 F.2d 1525 (9th Cir.), *cert. denied*, 488 U.S. 901 (1988) 20

Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) 16

Perry v. Lockhart, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989) 14, 18

Proffitt v. Florida, 428 U.S. 242 (1976) ..... *passim*

Pulley v. Harris, 465 U.S. 37 (1984) 22, 27

Robinson v. California, 370 U.S. 660 (1962) 8

Spaziano v. Florida, 468 U.S. 447 (1984) ... 10, 27, 28, 29

Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) 16

Tennessee v. Middlebrooks, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993) 5

Tison v. Arizona, 481 U.S. 137 (1987) 7, 8, 9, 10

United States v. Cooper, 754 F. Supp. 617 (N.D.Ill. 1990) 20

United States v. Pitera, 795 F. Supp. 546 (E.D.N.Y. 1992), *aff'd without published opinion*, 986 F.2d 499 (2d Cir. 1992) 20

United States v. Pretlow, 779 F. Supp. 758 (D.N.J. 1991) 20

Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992), *cert. denied*, 123 L.Ed.2d 479 (1993) 19

Woodson v. North Carolina, 428 U.S. 280 (1976) 8

Zant v. Stephens, 462 U.S. 862 (1983) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATE CASES:

Bertolotti v. State, 534 So.2d 386 (Fla. 1988) 20

Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991) 19

Haney v. State, 603 So.2d 368 (Ala. Crim. App. 1991), *cert. denied*, 113 S.Ct. 1297 (1993) 21

Humphrey v. Commonwealth, 836 S.W.2d 865 (Ky. 1992) 19

Johnson v. State, 823 S.W.2d 800 (Ark. 1992), *cert. denied*, 112 S.Ct. 3043 (1992) 21

Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975), *aff'd*, 428 U.S. 262 (1976) 18

McMillian v. State, 594 So.2d 1253 (Ala. Crim. App. 1991) 19

People v. Anderson, 43 Cal.3d 1104 (Cal. 1987) 18

People v. Bean, 46 Cal.3d 919 (Cal. 1988), *cert. denied*, 494 U.S. 1038 (1990) 19

People v. Marshall, 50 Cal.3d 907 (Cal. 1990), *cert. denied*, 111 S.Ct. 1023 (1991) 19

Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990), *cert. denied*, 112 S.Ct. 107 (1991) 19

State v. Benner, 533 N.E.2d 701 (Ohio 1988), *cert. denied*, 494 U.S. 1090 (1990) 20

State v. Burrell, 561 So.2d 692 (La. 1990), *cert. denied*, 111 S.Ct. 799 (1991) 21

State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980) 19

TABLE OF AUTHORITIES – Continued

Page

State v. Gardner, 789 P.2d 273 (Utah 1989), *cert. denied*, 494 U.S. 1090 (1990) 20

State v. Henderson, 528 N.E.2d 1237 (Ohio 1988), *cert. denied*, 489 U.S. 1072 (1989) 19

State v. Marshall, 586 A.2d 85 (N.J. 1991), *supplemental opinion*, 613 A.2d 1059 (1992), *cert. denied*, 113 S.Ct. 1306 (1993) 21

State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), *cert. granted*, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993) ..... *passim*

State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (N.J. 1987) 20

State v. Smith, 755 S.W.2d 757 (Tenn. 1988) 17

State v. Tassin, 536 So.2d 402 (La. 1988), *cert. denied*, 493 U.S. 874 (1989) 20

U.S. Constitution, U.S. Supreme Court Rules:

U.S. Const. Amend. VIII (Cruel and Unusual Punishment Clause) ..... *passim*

U.S. Const. Amend. XIV (Due Process Clause) 1, 8

Rule 37.5 of the Supreme Court..... 2

State Statutes:

Cal. Penal Code § 190.3(k)..... 25

Tenn. Code Ann. § 39-13-202(a)(2) (previously Tenn. Code Ann. § 39-2-202(a) (Supp.1988)) 23

TABLE OF AUTHORITIES – Continued

Page

Tenn. Code Ann. § 39-13-202(b) (previously Tenn. Code Ann. § 39-2-202(b) (Supp.1988)) 23

Tenn. Code Ann. § 39-13-204(a) (previously Tenn. Code Ann. § 39-2-203(a) (Supp.1988)) 23

Tenn. Code Ann. § 39-13-204(e) (previously Tenn. Code Ann. § 39-2-203(e) (Supp.1988)) 24

Tenn. Code Ann. § 39-13-204(f) (previously Tenn. Code Ann. § 39-2-203(f) (Supp.1988)) 24

Tenn. Code Ann. § 39-13-204(g) (previously Tenn. Code Ann. § 39-2-203(g) (Supp.1988)) 24, 25

Tenn. Code Ann. § 39-13-204(g)(2)(A) (previously Tenn. Code Ann. § 39-2-203(g)(2) (Supp.1988) 26

Tenn. Code Ann. § 39-13-204(h) (previously Tenn. Code Ann. § 39-2-203(h) (Supp.1988)) 25, 26

Tenn. Code Ann. § 39-13-204(i) (previously Tenn. Code Ann. § 39-2-203(i) (Supp.1988)). 24

Tenn. Code § 39-13-204(i)(7) (previously Tenn. Code Ann. § 39-2-203(i)(7) (Supp.1988)) 24

Tenn. Code Ann. § 39-13-204(j) (previously Tenn. Code Ann. § 39-2-203(j) (Supp.1988)). 25

Tenn. Code Ann. § 39-13-204(j)(5) (previously Tenn. Code Ann. § 39-2-203(j)(5) (Supp.1988)) 24

Tenn. Code Ann. § 39-13-204(j)(9) 25

Tenn. Code Ann. § 39-13-206(a)(1) (previously Tenn. Code Ann. § 39-2-205(a) (Supp.1988)) 26

Tenn. Code Ann. § 39-13-206(c)(1) (previously Tenn. Code Ann. § 39-2-205(c)(1) (Supp.1988)). 26

TABLE OF AUTHORITIES – Continued

Page

Tenn. Code Ann. § 39-13-206(d)(2) (previously Tenn. Code Ann. § 39-2-205(d)(2) (Supp.1988)) 27

Texas Penal Code § 19.03(b)(2) 14

APPENDICES:

Appendix A: Overview of State Capital Statutes and Felony Murder Provisions .....App. 1

Appendix B: California Attorney General's Office, Pending Capital Litigation on Direct Appeal, Including Felony Murder Convictions and Special Circumstances (Apr. 1993) .....App. 9

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INTEREST OF *AMICI*

This case presents important questions concerning the constitutionality of State capital sentencing schemes under the Eighth and Fourteenth Amendments and the availability of capital punishment for felony murder. *Amici* are States who have an interest in the orderly and proper admininstration of their capital sentencing statutes.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

Justice Drowota of the Supreme Court of Tennessee aptly characterized the respondent's crime: "This torture-murder of a kidnapped child unquestionably is one of the most aggravated killings that this Court has seen. The fourteen-year old victim's ordeal . . . began at 7:30 p.m. and ended at 11 p.m. This brutal and tragic murder is certainly one of the 'worst of the bad.'" *State v. Middlebrooks*, 840 S.W.2d 317, 350 (Tenn. 1992) (Drowota, J., concurring and dissenting), *cert. granted*, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993).

On the evening of April 26, 1987, fourteen year old Kerrick Majors and four friends spotted a flea market being set up by three homeless persons: respondent Donald Middlebrooks, his wife Tammy Middlebrooks, and Roger Brewington. After the boys began looking at the flea market items, Tammy Middlebrooks shouted for the boys to "leave our stuff alone!" The boys ran but Donald Middlebrooks and Brewington caught Majors, who was seen being dragged toward the flea market and was knocked down after respondent Middlebrooks struck him in the face. *Middlebrooks*, 840 S.W.2d at 323-24.

Majors' nude mutilated body was discovered the next afternoon in a dry creek bed near the area where he was apprehended by respondent and Brewington. In addition to deep stab wounds, abrasions and bruises on

his body, an odor of urine was noticed around Majors' face. At trial, a forensic pathologist testified that Majors was alive while incisions had been made on his body. Majors apparently bled to death. *Id.* at 324.

During the early hours of April 28th, Brewington led officers to the location of a knife with a brass knuckle handle and to a wooded area where the Middlebrooks were subsequently arrested. During the middle of the same day, respondent provided a video-taped statement, in which he contended his involvement in the murder of Majors was limited while Brewington played the lead role. According to this statement, Majors' hands were tied; Brewington beat Majors with the brass knuckles on the knife, hit him with a stick, and urinated in his mouth. *Id.* The Tennessee Supreme Court majority opinion recounted the torture inflicted upon Majors:

> [Respondent] admitted striking Majors with his open hand and on the leg with a switch. [Respondent] said that his wife Tammy had slapped Majors and burned Majors' nose with a cigarette lighter as Brewington urged her on. Brewington hit Majors on his testicles, threatened to cut "it" open, stuck a stick up Majors' anus, hit him some more with the brass knuckles, wiped the victim's blood on himself, beat his mouth and tongue with a stick, dropped the knife on him, gagged him, and slashed his wrist. Finally, when [respondent] asked Brewington to stop because the victim's crying and pleading were getting on his nerves, Brewington gave the victim "the kiss of death" on the forehead. Brewington then gave [respondent] the knife and told him to stab Majors. When [respondent] refused, Brewington stabbed

> Majors. [Respondent] then reluctantly stabbed the victim, according to him, "to prove to Roger that I guess I was cooler" and to put Majors out of his misery. In a previous statement, however, [respondent] had said that he had stabbed Majors twice. . . . [¶] The next day, [respondent] said he and Brewington went back to where they had left the body. Brewington kicked it and made the "X" lacerations at this time. [Respondent] said he then covered Majors with a foam mattress.

Id. at 324-25.

A jury found respondent guilty of first-degree felony murder and aggravated kidnapping, but not guilty of premeditated first-degree murder, armed robbery, or aggravated sexual battery. *Id.* at 325. During the sentencing phase, the jury found two aggravating circumstances beyond a reasonable doubt: (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (2) the murder was committed while [respondent] was engaged in committing a felony. Respondent was sentenced to death after the jury concluded these aggravating circumstances outweighed established mitigating circumstances. *Id.* at 325-26. Respondent was also sentenced to 60 years for aggravated kidnapping. *Id.* at 323.

On appeal, a unanimous Tennessee Supreme Court affirmed respondent's guilt. *See id.* at 323; *id.* at 347 (Drowota, J., concurring and dissenting); *id.* at 350 (Reid, C.J., concurring and dissenting). Although the Tennessee Supreme Court majority concluded there was ample evidence to support the first aggravating factor, *id.* at 347, the case was ordered remanded for resentencing after the

majority decided, *sua sponte*, *see id.* at 323, 335; *id.* at 347 (Drowota, J., concurring and dissenting), that the Tennessee statute in issue was unconstitutional as applied because the "double counting" of the felony murder at the guilt and penalty phases failed to narrow the class of persons eligible for the death penalty. *Id.* at 341, 342, 346. This Court granted certiorari. *Tennessee v. Middlebrooks*, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993).

SUMMARY OF ARGUMENT

This case furnishes an opportunity for this Court to clarify two important capital issues: (1) the availability of capital punishment for felony murders; and (2) the narrowing function required for capital cases under the Eighth Amendment. A substantial number of capital cases pending on direct review may be affected by the Court's decision in this case. *See, e.g.*, Appendix B.

The Tennessee statute at bar satisfies the Eighth Amendment narrowing function by narrowing the class of death-eligible murders to include felony murder. Under this Court's precedent, the narrowing under this statute serves as a legitimate basis to minimize the risk of arbitrary and capricious death sentences and to distinguish the class of cases where the death penalty may be imposed from those where it is not. The ultimate determination of sentence will depend on the actual facts and circumstances of the murder, the defendant's record, and the weight of this evidence against any available mitigating evidence.

Amici respectfully contend that *Jurek v. Texas*, 428 U.S. 262 (1976), and *Lowenfield v. Phelps*, 484 U.S. 231 (1988), should control the disposition of this case. These cases make clear that as long as the Eighth Amendment narrowing function is satisfied in the capital sentencing scheme, it need not be fulfilled at any particular stage. Several lower court decisions have relied upon these precedents to reject "double counting" arguments identical or similar to those raised in this case. The rationale relied upon by the Tennessee Supreme Court majority substantially resembles the petitioner's contention in *Lowenfield*, which this Court rejected as "rest[ing] on a mistaken premise as to the necessary role of aggravating circumstances." *Id.* at 244. There can be no impermissible "double counting" since the narrowing function is fulfilled at the guilt phase by the Legislature's definition of a capital offense to include first-degree felony murder. Nothing more is required under the Eighth Amendment. If the Tennessee Supreme Court majority position were adopted, a new "double narrowing" Eighth Amendment standard would be imposed on State capital sentencing schemes.

In the event that this Court determines that the Tennessee statute does not satisfy the narrowing function as articulated in *Jurek* and *Lowenfield*, this case presents an opportunity to clarify that the narrowing function may be fulfilled by other provisions in the capital sentencing scheme. As elaborated below, the Tennessee statute, considered in its entirety, satisfies Eighth Amendment standards to guide and channel the jury's discretion "by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976)

(joint opinion of Stewart, Powell, & Stevens, JJ.). Since the Eighth Amendment has been satisfied, the issues presented in this case are a byproduct of legislative – not constitutional – policy.

ARGUMENT

I. The Tennessee Supreme Court Majority Improperly Applied the Eighth Amendment Narrowing Requirement Under this Court's Precedent

A. Overview: The Felony Murder Rule and Capital Punishment

This Court has appropriately noted that:

> some nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property.

Tison v. Arizona, 481 U.S. 137, 157 (1987). As Justice O'Connor has observed, each felony murder case presents a "unique and complex mixture of facts" which must be assessed by the factfinder to determine the defendant's culpability. *Enmund v. Florida*, 458 U.S. 782, 825-26 (1982) (O'Connor, J., dissenting). This torture-murder and kidnapping case is an example of such an inhumane and senseless killing. The jury properly convicted

and sentenced the respondent after evaluating his culpability and role in the felony murder under the Tennessee capital statute, which conforms with Eighth Amendment standards.[1]

Recognizing that the Eighth Amendment does not prohibit capital punishment for *all* felony murders, this Court has categorized felony murders into subsets and considered the constitutional availability of capital punishment for felony murders under these subgroupings. At one end of the continuum, capital punishment may be imposed under the Eighth Amendment upon a "felony murderer who actually killed, attempted to kill, or intended to kill." *Tison*, 481 U.S. at 150; *see also Enmund*, 458 U.S. at 797, 801. At the other extreme of the continuum, capital punishment is not constitutionally permissible for a minor actor in the felony (*e.g.*, was not on the scene) who did not intend to kill or did not have any culpable mental state. *Tison*, 481 U.S. at 149-50; *Cabana v. Bullock*, 474 U.S. 376, 385 (1986); *Enmund*, 458 U.S. at 797, 801. In the intermediate subset, capital punishment may be constitutionally available for felony murders where there is "major participation in the felony committed, combined with reckless indifference to human life." *Tison*, 481 U.S. at 158.

This case provides this Court a further opportunity to clarify Eighth Amendment standards concerning cases

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[1] The Eighth Amendment Cruel and Unusual Punishment Clause is applicable to the States through the Fourteenth Amendment Due Process Clause. *See Woodson v. North Carolina*, 428 U.S. 280, 287 n.8 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (citing *Robinson v. California*, 370 U.S. 660, 666 (1962)).

falling within the intermediate subset. If the Tennessee Supreme Court majority decision is left undisturbed, capital punishment for felony murders might not be available where at least one of the aggravating circumstances was for felony murder.

A majority of capital punishment States permit capital punishment for felony murders. As a matter of legislative prerogative and consistent with the Eighth Amendment, States have varied the circumstances under which the offense of felony murder may be subject to a capital sentence. Some capital jurisdictions, for example, require an intent to kill before capital punishment may be imposed for felony murder.[2] In addition to the Tennessee capital statute at bar, seven other States – Arizona, California, Florida, Georgia, Maryland, Montana, and North Carolina – now fall into the classification, designated by this Court, allowing the death penalty for "felony murder *simpliciter*."[3] In these States, felony murder is one of a small class of murders which may be subject to the death penalty and the felony murder may also serve as an aggravating circumstance. *See, e.g.*, Appendix A & notes

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[2] *See Tison*, 481 U.S. at 158; *Enmund*, 458 U.S. at 790 & n.7; *see also* Appendix A (listing States). This Court has made clear that this policy decision to interpose an intent requirement is not constitutionally mandated. *Tison*, 481 U.S. at 158.

[3] *See Tison*, 481 U.S. at 153 & n.8; *see also Enmund*, 458 U.S. at 789 & n.5; Appendix A (listing States).

The Tennessee statute was amended in 1989, subsequent to the facts arising in this case. *See Middlebrooks*, 840 S.W.2d at 335-37 & n.6. The pre-1989 Tennessee law and the category of felony murder *simpliciter* are therefore in issue before the Court in this case.

13 & 15, *infra*. Finally, some States preclude the availability of the death penalty for felony murder as a matter of legislative policy. *See Tison*, 481 U.S. at 154 & n.10; *see also Enmund*, 458 U.S. at 789 & n.6; Appendix A.

A review of pending capital cases on direct review shows the broad ramifications of the *Middlebrooks* decision, if left intact. For example, in California there are currently 212 capital cases pending on direct appeal. Of these, 146 felony murder conviction cases (or sixty-eight percent of the total) involve at least one felony-murder special circumstance. *See* Appendix B.

B. The Eighth Amendment Narrowing Function and the Purported "Double Counting"

On several occasions, this Court has discussed the Eighth Amendment requirement that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " *Lowenfield*, 484 U.S. at 244 (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). This narrowing function advances the Eighth Amendment objective of ensuring that sentencing discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and supplies a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.* at 198 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); *see also Spaziano v.*

Florida, 468 U.S. 447, 460 & n.7 (1984); *Proffitt*, 428 U.S. at 258 (joint opinion of Stewart, Powell, & Stevens, JJ.).

The Tennessee Supreme Court majority found the Tennessee capital statute unconstitutional because it permitted a "double counting" at the guilt and penalty phases, since "the aggravating circumstance of committing a murder during a felony essentially duplicated the elements of the offense of first-degree felony murder." *Middlebrooks*, 840 S.W.2d at 341. In fact, as will be shown, the "double counting" characterization is a misnomer in light of this Court's case law, which makes clear that the narrowing function may be performed at *either* the guilt or penalty phases of a capital trial. Accordingly, if the narrowing function is already constitutionally satisfied at the guilt phase by the Legislature's definition of a capital offense, there can be no impermissible "double counting" under the Eighth Amendment.

C. This Case is Controlled by *Jurek* and *Lowenfield*

The Tennessee Supreme Court majority's untenable interpretation of the Eighth Amendment is illustrated by the following hypothetical: Assume, similar to the facts at bar, that a jury (1) found a defendant guilty of first-degree felony murder; (2) found a sole aggravating circumstance that the murder was heinous, atrocious or cruel for involving torture; and (3) concluded that this aggravating factor outweighed any mitigating circumstances. These facts are identical to the instant matter with the exception that the jury at bar found a second

aggravating circumstance of felony murder.[4] The Tennessee Supreme Court majority did not suggest that the narrowing function was violated by this example and did not hold that a felony-murder aggravating circumstance for any other capital offense is impermissible. Yet in the instant matter, the Eighth Amendment is violated, under the majority analysis, by the addition of the second aggravating factor for felony murder. The underlying premise of the majority opinion is that unconstitutional "double counting" occurs by the use of a felony murder aggravating circumstance *only* in first-degree felony murder capital cases. *See Middlebrooks*, 840 S.W.2d at 346 (holding).

This premise, if accepted, raises a fundamental question concerning the availability of capital punishment. If it is clear that a torture-murder following a first-degree felony murder verdict may be subject to capital punishment, then why should capital punishment suddenly be unavailable if the jury found a defendant guilty of first-degree felony murder and considered the felony-murder circumstances of the crime before rendering its sentence? In short, a jury verdict of felony murder is sufficient to narrow the class of murderers to those for which capital

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[4] In fact, the Tennessee Supreme Court unanimously affirmed the jury's guilty verdict on first-degree felony murder, *see Middlebrooks*, 840 S.W.2d at 323; *id.* at 347 (Drowota, J., concurring and dissenting); *id.* at 350 (Reid, C.J., concurring and dissenting), and at least a majority concluded ample evidence supported the aggravating circumstance of a heinous, atrocious, or cruel murder in that it involved torture or depravity of mind. *Id.* at 347.

punishment might be an appropriate penalty. The ultimate determination of sentence will depend on the actual facts and circumstances of the murder, the defendant's record, and the weight of this evidence against any available mitigating evidence.

In other related capital contexts, this Court has confronted and rejected similar "double counting" contentions. This precedent shows that the Eighth Amendment narrowing function was properly satisfied by the Tennessee statute at bar. In *Lowenfield*, this Court considered a challenge to the Louisiana capital statute where the only aggravating circumstance found by the jury was identical to an element for the capital offense of first-degree murder. *See* 484 U.S. at 241, 243. In upholding the Louisiana statute, this Court held:

> the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.[5]

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[5] *Lowenfield*, 484 U.S. at 246. In *Lowenfield*, one element of first-degree murder under Louisiana law was that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person"; the overlapping aggravating circumstance was that "the offender knowingly created a risk of death or great bodily harm to more than one person." *Id.* at 243. Both provisions were similarly construed under State law. *Id.* at 243-44.

A related "double counting" issue was raised concerning the Arkansas capital statute. Initially, the Eighth Circuit held

Lowenfield relied upon *Jurek v. Texas*, 428 U.S. 262 (1976), a case where the narrowing function was also performed at the guilt phase by the Texas Legislature's definition of the death-eligible offenses. The *Jurek* plurality opinion observed that while the Texas capital sentencing scheme – unlike other State capital statutes – did not contain a list of statutory aggravating circumstances to be considered by the sentencer, the Legislature's "action in *narrowing the categories of murders* for which a death sentence may ever be imposed serves much the same purpose." *Id.* at 270 (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added). Under the Texas statute, only five enumerated classes of murders could be eligible for the death penalty, one of which was felony murder. *Id.* at 265, 268 (citing Texas Penal Code § 19.03(b)(2) ("murder in the course of committing or

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that a pecuniary gain aggravating circumstance could not be considered in the sentencing phase of robbery/murder cases because it duplicated an element of the offense of robbery/murder established in the guilt phase. *See Collins v. Lockhart*, 754 F.2d 258, 264 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). Relying upon *Lowenfield*, the Eighth Circuit subsequently overruled *Collins*. *See Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir.) ("*Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*."), *cert. denied*, 493 U.S. 959 (1989). While this Court has not directly considered the merits of either *Collins* or *Perry*, it has subsequently presumed the correctness of the *Perry* decision. *See Lockhart v. Fretwell*, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993) (noting "it was the premise of our grant in this case that *Perry* was correctly decided, *i.e.*, that respondent was not entitled to an objection based on 'double counting' "); *see also id.* at 841-42, 843 & n.4.

attempting to commit kidnapping, burglary, robbery, forcible rape, or arson")).[6]

A comparison with the statutes considered by this Court in *Jurek* and *Lowenfield* shows that the Tennessee statute at bar clearly satisfies the Eighth Amendment narrowing requirement. The Tennessee statute is in fact more stringent than the Texas statute upheld in *Jurek*, as it imposes additional prerequisites (beyond that required by the Eighth Amendment) before any capital defendant may be sentenced to death. *First*, at the guilt phase, a

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[6] The *Jurek* opinion concluded that:

> in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance [*e.g.*, felony murder] *before* the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and . . . other . . . States is that the death penalty is an available sentencing option – even potentially – for a *smaller class of murders* in Texas. . . . [¶] Thus, Texas law essentially requires that one of five aggravating circumstances be found *before a defendant can be found guilty of capital murder*, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. [In this manner,] the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

Jurek, 428 U.S. at 270-71, 273-74 (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added); *see also Zant*, 462 U.S. at 879 ("The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage.").

Tennessee jury must find that the defendant committed a death-eligible offense (*e.g.*, first-degree felony murder). *See* note 13, *infra*. *Second*, at the penalty phase, the jury must conclude that at least one of twelve enumerated aggravating circumstances have been established beyond a reasonable doubt. One of these aggravating circumstances is felony murder. *See* note 15, *infra*. *Finally*, the jury must find the existence of any mitigating circumstances and determine whether the aggravating circumstances outweigh the mitigating circumstances. *See* note 16, *infra*.

In contrast, the Texas statute in issue in *Jurek*, *inter alia*, only included the first and third steps. This Court determined that no more was constitutionally required. Instead, here, as a matter of legislative policy, the Tennessee Legislature interposed an additional second step. In this regard, the Tennessee statute at bar is similar to the Louisiana statute considered in *Lowenfield*, which also contained the three highlighted steps.[7] *Lowenfield* makes

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[7] In one distinction not pertinent to the "double counting" issue, Tennessee is a "weighing" State while Louisiana is not. *See Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1138, 117 L.Ed.2d 367 (1992); *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 738, 112 L.Ed.2d 812 (1991) (defining "weighing state"). This distinction reiterates the flexibility afforded to States in adopting capital sentencing schemes which comport with Eighth Amendment requirements. *See, e.g., Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990) ("The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by the jury."); *Zant*, 462 U.S. at 876 n.13 ("[S]pecific standards for balancing aggravating against mitigating circumstances are not constitutionally required.").

clear that as long as the narrowing function is satisfied in the capital sentencing scheme, it need not be performed through aggravating circumstances. As noted in *Lowenfield*,

> The use of 'aggravating circumstances' is not an end in itself, but [one] means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. . . . [¶] The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.

484 U.S. at 244, 246. The Tennessee Supreme Court majority, in a conclusory manner, dismissed *Lowenfield* as "inapposite" for purposes of Eighth Amendment analysis, *see Middlebrooks*, 840 S.W.2d at 346, and, in so doing, inexplicably rejected prior Tennessee Supreme Court decisions expressly relying upon *Lowenfield*. *See Middlebrooks*, 840 S.W.2d at 348 (Drowota, J., concurring and dissenting) (citing *State v. Smith*, 755 S.W.2d 757, 768 (Tenn. 1988) (citing *Lowenfield* and other cases), *rev'd*, *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992)).

However, as can be seen from *Jurek* and *Lowenfield*, if the Tennessee Supreme Court majority position were adopted, a new Eighth Amendment requirement would be imposed on State capital statutes, requiring the narrowing function to be fulfilled *twice*: first, in the definition of the capital offense during the guilt phase, and second, through aggravating circumstances at the penalty phase. Under this analysis, the class of all murderers would have to be distinguished from those who were

merely eligible for the death penalty. A second narrowing would be required to segregate those who were eligible for the death penalty from those who could actually be sentenced to death after considering aggravating and mitigating circumstances. This "double narrowing," quite simply, is not required by the Eighth Amendment or by any of this Court's precedents.

Under the rationale and holdings of *Jurek* and *Lowenfield*, the narrowing function required by the Eighth Amendment is fulfilled when the Tennessee statute narrows the class of murders which may be subject to capital punishment, one of which is felony murder. Other courts have reached the same conclusion in considering similar capital statutes.[8] Federal and State courts have relied upon this Court's guidance in *Lowenfield* to reject a claim

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[8] *See, e.g., Perry*, 871 F.2d at 1393 (felony murder as a death-eligible offense "serve[s] to narrow the class of death eligible murderers from all murderers"); *Byrne v. Butler*, 845 F.2d 501, 515 n.12 (5th Cir. 1988) (noting "narrowing function was performed by the jury at the guilt phase" when defendant was convicted of felony murder); *People v. Anderson*, 43 Cal.3d 1104, 1147 (Cal. 1987) (noting that "by making the felony murderer but not the simple murderer death-eligible, a death penalty law furnishes the 'meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'") (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)); *see also Jurek v. State*, 522 S.W.2d 934, 939 (Tex. Crim. App. 1975) (The Texas statute "limits the circumstances under which the State may seek the death penalty to a *small group of narrowly defined and particularly brutal offenses*. This insures that the death penalty will only be imposed for the most serious crimes [and] . . . that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances.") (emphasis added) (quoted in *Jurek*, 428 U.S. at 270), *aff'd*, 428 U.S. 262 (1976).

that felony murder may not serve as an aggravating circumstance in a capital case for a person convicted of felony murder.[9] These courts have also relied upon this

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[9] *See Johnson v. Dugger*, 932 F.2d 1360, 1368-69 (11th Cir.) (relying, in part, upon *Lowenfield* to reject argument "that Florida law, by permitting [a] conviction and [a] death sentence to be predicated on a single finding of felony murder, denied [petitioner] constitutionally adequate sentencing safeguards"), *cert. denied*, 112 S.Ct. 427 (1991); *Bertolotti v. Dugger*, 883 F.2d 1503, 1527-28 (11th Cir. 1989) (rejecting challenge to use of felony-murder aggravating circumstance in capital felony murder case), *cert. denied*, 497 U.S. 1032 (1990); *see also Delap v. Dugger*, 890 F.2d 285, 314 n.38 (11th Cir. 1989) ("Had Delap been convicted of felony murder at his first trial, there would be no impediment to a finding of a felony-murder aggravating factor at sentencing.") (emphasis omitted), *cert. denied*, 496 U.S. 929 (1990); *Byrne*, 845 F.2d at 515 n.12 (noting that where defendant was convicted of felony murder, "[t]he fact that one of the aggravating circumstances was one of the elements of the crime does not render the sentence constitutionally infirm"); *see also McMillian v. State*, 594 So.2d 1253, 1278 (Ala. Crim. App. 1991); *People v. Marshall*, 50 Cal.3d 907, 945-46 (Cal. 1990), *cert. denied*, 111 S.Ct. 1023 (1991); *Sanders v. Commonwealth*, 801 S.W.2d 665, 682 (Ky. 1990), *cert. denied*, 112 S.Ct. 107 (1991); *People v. Bean*, 46 Cal.3d 919, 958 (Cal. 1988), *cert. denied*, 494 U.S. 1038 (1990); *State v. Henderson*, 528 N.E.2d 1237, 1243 (Ohio 1988), *cert. denied*, 489 U.S. 1072 (1989); *cf. Wilson v. Commonwealth*, 836 S.W.2d 872, 891 (Ky. 1992) (rejecting similar double jeopardy argument), *cert. denied*, 123 L.Ed.2d 479 (1993); *Humphrey v. Commonwealth*, 836 S.W.2d 865, 868 (Ky. 1992) (same).

The *Middlebrooks* majority relies in part upon *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551, 567-68 (1979), *cert. denied*, 446 U.S. 941 (1980), and other cases, which predated *Lowenfield*. These cases are contrary to and did not have the benefit of this Court's explication of the narrowing function in *Lowenfield*. *See Middlebrooks*, 840 S.W.2d at 341-42. The majority also cites to *Engberg v. Meyer*, 820 P.2d 70, 90-91 (Wyo. 1991) (Cardine, J., concurring), which misapplied *Lowenfield* and attempted to distinguish

Court's precedents to reject similar "double counting" or "overlapping" contentions.[10] This line of cases firmly

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Lowenfield as limited to cases where the narrowing function occurred during the guilt phase. *See Middlebrooks*, 840 S.W.2d at 342.

[10] *See, e.g., Giarratano v. Procunier*, 891 F.2d 483, (4th Cir. 1989) ("The constitutionality of the [Virginia] statute is buttressed by reading it in the context of the already narrowly defined range of capital offenses."), *cert. denied*, 498 U.S. 881 (1990); *McKenzie v. Risley*, 842 F.2d 1525, 1539 (9th Cir.) ("Just as in *Lowenfield* and *Jurek*, the [jury] findings required by the Montana statutes – that McKenzie tortured and caused the death of Lana Harding [one of six types of homicide punishable by death] – were adequate to place his crimes within the narrow class of offenses for which the death penalty may be appropriate."), *cert. denied*, 488 U.S. 901 (1988); *United States v. Pitera*, 795 F. Supp. 546, 556-57 (E.D.N.Y. 1992) ("As with the statute in *Lowenfield*, [federal statute] significantly narrows the class of murderers eligible for the death penalty at the guilt phase."), *aff'd without published opinion*, 986 F.2d 499 (2d Cir. 1992); *United States v. Pretlow*, 779 F. Supp. 758, 771-72 (D.N.J. 1991) ("Similar to its statutory counterpart in *Lowenfield*, [federal statute] initially narrows the class of death-eligible defendants at the guilt phase by limiting the class. . . . "); *United States v. Cooper*, 754 F. Supp. 617, 622 (N.D.Ill. 1990) (same); *see also State v. Ramseur*, 106 N.J. 123, 188, 524 A.2d 188, 220 (N.J. 1987) (upholding overlap for death-eligible offense for defendant who pays another to commit purposeful murder and payment for murder as aggravating circumstance); *State v. Tassin*, 536 So.2d 402, 409 n.17 (La. 1988) ("The same aggravating circumstances may be an element of the underlying offense of first degree murder and an aggravating circumstance at the penalty phase of trial."), *cert. denied*, 493 U.S. 874 (1989); *State v. Benner*, 533 N.E.2d 701, 708 (Ohio 1988) (rejecting argument that "an aggravating circumstance cannot duplicate an element of the underlying offense"), *cert. denied*, 494 U.S. 1090 (1990); *Bertolotti v. State*, 534 So.2d 386, 387 & n.3 (Fla. 1988) (rejecting claim that aggravating circumstances overlapped with elements of offense, as an alternative

establishes the proposition that while the capital sentencing scheme must fulfill the Eighth Amendment narrowing function, as a matter of legislative prerogative, the State Legislature may decide at what point in the process this occurs. In this case, Tennessee has constitutionally decided to include felony murder in the narrow class of death-eligible murders.

II. Alternatively, the Eighth Amendment Narrowing Function And Individualized Sentencing Requirement Are Fulfilled By Other Provisions in the Tennessee Capital Sentencing Statute

Assuming *arguendo* that this Court concludes that the Tennessee statute does not satisfy the *Jurek* and *Lowenfield* narrowing standards, this case may provide an opportunity to clarify that the narrowing function may be

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ground, by citing *Lowenfield*); *State v. Gardner*, 789 P.2d 273, 280 (Utah 1989) (rejecting "contention that the same aggravating circumstance cannot be relied upon in the guilt phase and in the penalty phase"), *cert. denied*, 494 U.S. 1090 (1990); *State v. Burrell*, 561 So.2d 692, 710 (La. 1990) (upholding use of capital offense as aggravating circumstances), *cert. denied*, 111 S.Ct. 799 (1991); *State v. Marshall*, 586 A.2d 85, 156 (N.J. 1991) ("[N]o constitutional infirmity exists because the aggravating factor found by the jury mirrors an element of the offense of which defendant was convicted."), *supplemental opinion*, 613 A.2d 1059 (1992), *cert. denied*, 113 S.Ct. 1306 (1993); *Haney v. State*, 603 So.2d 368, 379-80 (Ala. Crim. App. 1991) (upholding overlap of aggravating circumstance of pecuniary gain and capital offense of murder for hire, and citing other cases upholding similar overlap), *cert. denied*, 113 S.Ct. 1297 (1993); *Johnson v. State*, 823 S.W.2d 800, 806 (Ark. 1992) (rejecting "double counting" argument that pecuniary gain element of offense and as aggravating circumstance violates Eighth Amendment), *cert. denied*, 112 S.Ct. 3043 (1992).

fulfilled by other provisions in the capital sentencing scheme.

A. Systemic Assessment

As the *Gregg* joint opinion noted, "each distinct [capital sentencing] system must be examined on an individual basis" to ascertain whether it passes constitutional muster.[11] A systemic evaluation is appropriate since capital sentencing schemes are not susceptible to mathematical precision. As was noted in *Proffitt*:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

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[11] *Gregg*, 428 U.S. at 195 (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoted in *Zant*, 462 U.S. at 875); *see also Middlebrooks*, 840 S.W.2d at 348-49 (Drowota, J., concurring and dissenting) ("The system must be examined as a whole just as it works as a whole."); *see generally Arave v. Creech*, 113 S.Ct. 1534, 1543, 123 L.Ed.2d 188 (1993) (considering "the statutory scheme" in assessing the validity of challenged aggravating circumstance); *Pulley v. Harris*, 465 U.S. 37, 49 (1984) (noting "at least in light of the other safeguards in the Texas statute, proportionality review would have been constitutionally superfluous"); *Proffitt*, 428 U.S. at 254 n. 11 (joint opinion of Stewart, Powell, & Stevens, JJ.) ("[W]e examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the . . . capital-sentencing scheme, *when viewed in its entirety*, will result in the capricious or arbitrary imposition of the death penalty.") (emphasis added).

Proffitt, 428 U.S. at 258 (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added). A review of the Tennessee statute before the Court shows that the Eighth Amendment narrowing function is satisfied by other protections in the capital sentencing scheme.

The bifurcated system guides and channels the exercise of the jury's discretion by focusing the trier of fact on relevant factors and issues and by separating the guilt determination from any sentence.[12] During the guilt phase, the jury must determine whether a death-eligible offense (*i.e.*, first-degree felony murder) has been committed by the defendant beyond a reasonable doubt.[13] In the event a unanimous verdict is obtained, the sentencer must determine during the penalty phase whether death or life imprisonment is an appropriate sentence.[14]

The sentencer is not bound by any decisions made during the guilt phase. During the penalty phase, the jury must unanimously determine the existence of at least one

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[12] *See* Tenn. Code Ann. § 39-13-204(a) (previously Tenn. Code Ann. § 39-2-203(a) (Supp.1988)); *see also Zant*, 462 U.S. at 875; *Gregg*, 428 U.S. at 191-92, 195 (joint opinion of Stewart, Powell, and Stevens, JJ.).

[13] Tenn. Code Ann. § 39-13-202(a)(2) (felony murder) (previously Tenn. Code Ann. § 39-2-202(a) (Supp.1988) (reproduced in *Middlebrooks*, 840 S.W.2d at 341)).

[14] Tenn. Code Ann. § 39-13-202(b) (previously Tenn. Code Ann. § 39-2-202(b) (Supp.1988)).

aggravating factor beyond a reasonable doubt (*e.g.*, felony murder).[15] The unanimous finding of aggravating circumstances alone does not result in a death sentence, as the trial judge instructs the jury to determine whether any aggravating circumstances outweigh any mitigating circumstances.[16]

Mitigating circumstances advance the Eighth Amendment "requirement of individualized sentencing in capital cases, . . . by allowing the jury to consider all relevant mitigating evidence." *Blystone*, 494 U.S. at 307; *see also Zant*, 462 U.S. at 879. Tennessee, like twenty-two other States, expressly allows consideration of the defendant's minor role as a mitigating factor.[17] The jury may consider

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[15] *See* Tenn. Code Ann. §§ 39-13-204(f), (i) (previously Tenn. Code Ann. §§ 39-2-203(f), (i) (Supp.1988)); *see also* Tenn. Code § 39-13-204(i)(7) (felony-murder aggravating circumstance) (previously Tenn. Code Ann. § 39-2-203(i)(7) (Supp.1988) (reproduced in *Middlebrooks*, 840 S.W.2d at 341)); *Bertolotti*, 883 F.2d at 1528.

[16] Tenn. Code Ann. §§ 39-13-204(e), (f), (g) (previously Tenn. Code Ann. §§ 39-2-203(e), (f), (g) (Supp.1988)); *see also Blystone*, 494 U.S. at 304-05 (discussing function of aggravating and mitigating circumstances); *Jurek*, 428 U.S. at 271 (joint opinion of Stewart, Powell, & Stevens, JJ.) (same); *Proffitt*, 428 U.S. at 253 (joint opinion of Stewart, Powell, & Stevens, JJ.) (discussing role of aggravating and mitigating circumstances to minimize the risk that the death penalty might "be imposed in an arbitrary or capricious manner").

[17] Tenn. Code Ann. § 39-13-204(j)(5) ("The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor.") (previously Tenn. Code Ann. § 39-2-203(j)(5) (Supp.1988)); Appendix A (listing States); *see also Enmund*, 458 U.S. at 792 (noting mitigating circumstances concerning minimal

"any mitigating circumstances" and is not limited to those enumerated in the statute.[18]

The jury must unanimously agree on a sentence of death.[19] If a death sentence is rendered, the jury must identify in writing the statutory aggravating circumstances and "[s]ignify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating

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participation "reduce the likelihood that a person will be executed for vicarious felony murder"); *Lockett v. Ohio*, 438 U.S. 586, 617 n.3 (1978) (Blackmun, J., concurring in part and concurring in the judgment).

[18] Tenn. Code Ann. § 39-13-204(j) (previously Tenn. Code Ann. § 39-2-203(j)).

Tennessee now has a statutory catch-all mitigation provision, expressly allowing the jury to consider "[a]ny other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing." *See* Tenn. Code Ann. § 39-13-204(j)(9); *see also Blystone*, 494 U.S. at 305 & n.2 (discussing role of "catchall" mitigating factor); *see generally Lockett*, 438 U.S. at 604 (opinion of Burger, C.J.) (holding that the Constitution forbids the jury from being "precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offenses that the defendant proffers as a basis for a sentence less than death").

Other States have similar statutory catch-all mitigation provisions. *See, e.g.*, Cal. Penal Code § 190.3(k) ("Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."); Appendix A (listing 15 States); *Lockett*, 438 U.S. at 617 n.3 (Blackmun, J., concurring in part and concurring in the judgment) (listing State statutes).

[19] Tenn. Code Ann. §§ 39-13-204(g), (h) (previously Tenn. Code Ann. §§ 39-2-203(g), (h) (Supp.1988)).

circumstances."[20] If the jury cannot reach unanimous agreement on the punishment, a sentence of life imprisonment is imposed by the judge.[21]

As this Court has observed, meaningful appellate review of death sentences minimizes the risk of arbitrary and capricious sentencing determinations.[22] In Tennessee, a convicted capital defendant has a statutory right of direct appeal to the court of criminal appeals; any affirmed conviction and death sentence are automatically reviewed by the Tennessee Supreme Court.[23] Each level of appellate review includes a review of whether: the sentence was imposed arbitrarily; the evidence supports the aggravating circumstances; any aggravating circumstances outweigh any mitigating circumstances; the death sentence is excessive or disproportionate in light of similar cases, taking into account the defendant and the nature of the crime.[24] The reviewing court may, where

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[20] Tenn. Code Ann. § 39-13-204(g)(2)(A) (previously Tenn. Code Ann. § 39-2-203(g)(2) (Supp.1988) ("Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.")).

[21] Tenn. Code Ann. § 39-13-204(h) (previously Tenn. Code Ann. § 39-2-203(h) (Supp.1988)).

[22] *See, e.g., Zant*, 462 U.S. at 875, 879-80; *Proffitt*, 428 U.S. at 258-59 (joint opinion of Stewart, Powell, & Stevens, JJ.); *Gregg*, 428 U.S. at 195, 198 (joint opinion of Stewart, Powell, and Stevens, JJ.).

[23] Tenn. Code Ann. § 39-13-206(a)(1) (previously Tenn. Code Ann. § 39-2-205(a) (Supp.1988) (automatic review by the Tennessee Supreme Court)).

[24] Tenn. Code Ann. § 39-13-206(c)(1) (previously Tenn. Code Ann. § 39-2-205(c)(1) (Supp.1988)).

appropriate, "[m]odify the punishment to life imprisonment."[25]

To be sure, all of these steps imposed by the Tennessee Legislature are not constitutionally required. For example, this Court has held that proportionality review by a reviewing court is not constitutionally mandated, although it provides "an additional safeguard against arbitrarily imposed death sentences." *Pulley*, 465 U.S. at 50. Taken as a whole, these protections under the Tennessee statute satisfy the Eighth Amendment requirement that the "sentencing discretion [be] guided and channeled by a *system* that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." *Proffitt*, 428 U.S. at 258 (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added).

B. Legislative Prerogative

Finally, *amici* wish to emphasize that many of the issues concerning the circumstances under which capital punishment may be warranted are issues of legislative – not constitutional – policy. In fact, this Court has not dictated a specific capital sentencing scheme, recognizing that "[t]he State has considerable freedom to structure its capital sentencing system as it sees fit."[26]

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[25] Tenn. Code Ann. § 39-13-206(d)(2) (previously Tenn. Code Ann. § 39-2-205(d)(2) (Supp.1988)).

[26] *Cabana*, 474 U.S. at 386-87; *see also Spaziano*, 468 U.S. at 464 ("As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its

Once constitutional standards have been satisfied, the eligibility of any offense for capital punishment, including felony murder, is the product of legislative judgment. *See, e.g., Gregg*, 428 U.S. at 186-87 ("The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures.") (joint opinion of Stewart, Powell, & Stevens, JJ.). For example, this Court has already recognized that intent to kill is not a prerequisite for the capital punishment of all felony murders, although as a matter of legislative policy some States have imposed this standard. *See* note 2, *supra*, & Appendix A. Moreover, a constitutional infirmity is not established where a few States – or even one – favor a particular capital sentencing procedure in direct contrast to the position adopted in a

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capital sentencing scheme.") (citations omitted); *Gregg*, 428 U.S. at 176 (joint opinion of Stewart, Powell, & Stevens, JJ.); *Bertolotti*, 883 F.2d at 1528 n.22.

This Court has afforded States flexibility in determining "how" to set up their capital sentencing schemes and "when" in this process Eighth Amendment standards should be satisfied. *See, e.g., Cabana*, 474 U.S. at 385 ("The decision whether a particular punishment – even the death penalty – is appropriate in any given case is not one that we have ever required to be made by a jury."); *id.* at 386-87 (noting State has flexibility to determine when, during the criminal justice process, an *Enmund* finding must be made); *Zant*, 462 U.S. at 890 ("[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances."); *accord Spaziano*, 468 U.S. at 463 n.9 (noting State practices in permitting a jury or judge to impose the death penalty); *Zant*, 462 U.S. at 879 n.17 ("A State is, of course, free to decide as a matter of state law to limit the evidence of aggravating factors that the prosecution may offer at the sentencing hearing.").

majority of States. *See Spaziano*, 468 U.S. at 464 ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."). For example, while most States have a bifurcated system, Florida has a trifurcated system for making capital punishment sentencing decisions, which has been upheld by this Court. *See id.* at 464-65.

Just as some States prefer to adopt "weighing" schemes as part of their capital statute, while others do not, *see, e.g.*, note 7, *supra*, here, Tennessee and other States have chosen to permit a felony-murder aggravating circumstance to be considered following a guilt determination of first-degree felony murder. Further some States have chosen to vary the number of felonies which may be considered at the sentencing phase from the number considered at the guilt phase. *See, e.g.*, Appendix A. Absent a constitutional infirmity, these legislative decisions represent a State policy choice. Related policy considerations were implicated by the sentencing schemes considered in *Jurek* and *Lowenfield* and upheld by this Court. Based upon this rationale, *amici* respectfully request that the statute at bar be upheld.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be reversed.

Dated: June 3, 1993

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APPENDIX A
Overview of 1993 State Capital Statutes and Felony Murder Provisions*

FELONY-MURDER CAPITAL OFFENSES

Seven states permit capital punishment for felony murder *simpliciter* (where murder resulting during the commission of a felony is considered at both the guilt and sentencing phases of a capital trial):	Ariz. Rev. Stat. Ann. §§ 13-1105(A)(2), 13-703(F)(5) (robbery/ pecuniary gain), 13-703(F)(9) (felony murder during commission of child abuse); Cal. Penal Code §§ 189, 190.2(a)(17); Fla. Stat. ch. 782.04(1)(a)(2), 921.141(5)(d); Ga. Code Ann. §§ 16-5-1(c), 17-10-30(b)(2); Md. Ann. Code art. 27, §§ 407, 408, 409, 410, 413(d)(10); Mont. Code Ann. §§ 45-5-102(1)(b), 46-18-303(7), (9); N.C. Gen. Stat. §§ 14-17, 15A-2000(e)(5).
Five states authorize capital punishment in felony-murder cases upon a showing of culpable mental state such as recklessness or extreme indifference to human life:	Ark. Code Ann. § 5-10-101(a)(1) (circumstances manifesting extreme indifference to the value of human life); Del. Code Ann. tit. 11, §§ 636(a)(2), (b) (recklessly causes death); Ill. Rev. Stat. ch. 38, para. 9-1(a)(3), (b)(6)(b) (strong probability of death or great bodily harm); N.H. Rev. Stat. Ann.

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* Prepared by Jennifer P. Anderson, California Attorney General's Office.

630:5(VII)(a)(1), (3) (purposely killed or engaged in conduct defendant knew would create grave risk of death); Tenn. Code Ann. § 39-13-202(a)(2), (a)(3) (reckless killing) (1989 enactment).

Capital felony-murder statutes in nine states require an intent to kill:

Ala. Code §§ 13A-2-23, 13A-5-40(a)(2), (b), 13A-5-51, 13A-6-2(a)(2) (with intent to cause death); La. Rev. Stat. Ann. 14:30(A)(1), La. Code Crim. Proc. Ann. art. 905.4(A)(1) (specific intent to kill); N.H. Rev. Stat. Ann. §§ 630:1(I)(b), (I)(e), (I)(f), 630:5(VII)(a)(1), (3) (knowingly cause the death of another); Ohio Rev. Code Ann. §§ 2903.01(B)-(D), 2929.02(A), 2929.04(A)(7) (intended to cause death); Or. Rev. Stat. §§ 163.095(2)(d), 163.115(1)(b) (intentionally committed homicide); Tex. Penal Code Ann. §§ 19.02(a)(3), 19.03(a)(2) (intentionally commits murder); Utah Code Ann. § 76-5-202(1) (intentionally or knowingly causes death); Va. Code § 18.2-31 (willful, deliberate, and premeditated killing); Wyo. Stat.

§§ 6-2-101(a), 6-2-102(h)(iv), (xii) (kills purposely and with premeditated malice).

One state does not have an express capital felony-murder offense statute:

N.J. Stat. Ann. §§ 2C:11-3a, 2C:11-3b (felony murder not a capital offense).

FELONY-MURDER AGGRAVATING CIRCUMSTANCES

Five states consider felony-murder circumstances only as an aggravating factor for capital murder:

Ky. Rev. Stat. Ann. §§ 507.020 (intent to cause death or wantonly engages in conduct which creates a grave risk of death), 532.025(2)(a)(2) (felony-murder aggravating circumstance); Mo. Rev. Stat. §§ 565.020 (knowingly causes death after deliberation upon the matter), 565.032(2)(11) (felony-murder aggravating circumstance); 18 Pa. Cons. Stat. §§ 2502(A) (intentional killing), 42 Pa. Cons. Stat. § 9711(D)(6) (felony-murder aggravating circumstance); S.C. Code Ann. §§ 16-3-20(C)(a)(1) (killing with malice aforethought), 16-3-30 (felony-murder aggravating circumstance); Wash. Rev. Code

§§ 9A.32.030 (premeditation), 10.95.020(9) (felony-murder aggravating circumstance).

Statutes in three states require a showing of culpable mental state such as recklessness or extreme indifference to human life for felony-murder aggravating circumstances:

Ill. Rev. Stat. ch. 38, para. 9-1(a)(3), (b)(6)(b) (strong probability of death or great bodily harm); N.H. Rev. Stat. Ann. §§ 630:1(I)(b), (I)(e), (I)(f), 630:5 (VII)(a)(1), (3) (purposely killed or engaged in conduct defendant knew would create grave risk of death); Tenn. Code Ann. § 39-13-202(a)(2), (a)(3) (reckless killing) (1989 enactment).

Statutes in seven states require an intent to kill for felony-murder aggravating circumstances (listing capital felony-murder and pertinent aggravating circumstance provisions):

Colo. Rev. Stat. §§ 16-11-103(5)(g), 18-3-102(1)(b) (intentionally caused death); Idaho Code §§ 18-4003(d), 19-2515(g)(7) (specific intent to cause death); Ill. Rev. Stat. ch. 38, para. 9-1(a)(3), (b)(6)(b) (intent to kill or knowledge that acts created strong probability of death or great bodily harm); Ind. Code §§ 35-42-1-1(2), 35-50-2-9(b)(1) (intentional killing during specified felonies); Miss. Code Ann. §§ 97-3-19(2)(e), (f), 99-19-101(7) (jury must find

defendant actually killed, attempted to kill, intended that killing take place, or contemplated that lethal force would be used); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4), 200.033(4)(a)-(b) (defendant killed, attempted to kill, or knew life would be taken or lethal force used); N.M. Stat. Ann. §§ 30-2-1(A)(2), 31-20A-5 (intent to kill). *See also* Neb. Rev. Stat. §§ 28-303(2), 29-2523(1) (alternative aggravating circumstance required for imposition of death penalty); Okla. Stat. tit. 21, §§ 701.7(B), 701.9(A), 701.10(C), 701.11, 701.12 (same); S.D. Codified Laws Ann. §§ 22-16-4, 23A-27A-1 (same).

Four states list parallel felonies for both the guilt and sentencing phases of capital felony-murder trials:

Cal. Penal Code §§ 189, 190.2(a)(17) (robbery, kidnapping, rape, sodomy, lewd or lascivious act upon person of a child under age of 14, oral copulation, burglary in the first or second degree, arson, train wrecking, mayhem, rape by instrument); Del. Code Ann. tit. 11, §§ 636(a)(2), 4209(e)(2) (any felony); Idaho Code §§ 18-4003(d), 19-2515(g) (aggravated

battery on child under 12, arson, rape, robbery, burglary, kidnapping, mayhem); Tenn. Code Ann. §§ 39-13-202(a)(2), (3), 39-13-204(i)(7) (arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb) (1989 enactment).

One state increases the number of felonies which may be considered at the sentencing phase from the number which may be considered at the guilt phase of a capital felony-murder trial:

Colo. Rev. Stat. §§ 18-3-102(1)(a) (enumerating at guilt phase arson, robbery, burglary, kidnapping, sexual assault, escape), 16-11-103(5)(d), (f) (enumerating at sentencing phase kidnapping and any Class 1, 2, or 3 felony).

Other states with capital felony-murder statutes reduce the number of felonies which may be considered at the sentencing phase from the number which may be considered at the guilt phase of a capital felony-murder trial:

See e.g, Mont. Code Ann. §§ 45-5-102(1)(b) (enumerating at guilt phase robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, felony assault, aggravated assault, or any other forcible felony), 46-18-303(7) (enumerating at sentencing phase only aggravated kidnapping).

MITIGATING CIRCUMSTANCES

Twenty-three states expressly permit the consideration of a defendant's minor participation in a capital murder as a mitigating circumstance:

Ala. Code § 13A-5-51(4); Ariz. Rev. Stat. Ann. § 13-703(G)(3); Ark. Code Ann. § 5-4-605(5); Cal. Penal Code § 190.3(f); Colo. Rev. Stat. § 16-11-103(4)(d); Conn. Gen. Stat. § 53a-46a(g)(4); Fla. Stat. Ch. 921.141(6); Ind. Code § 35-50-2-9(c)(4); Ky. Rev. Stat. Ann. § 532.025(2)(b)(5); La. Code Crim. Proc. Ann. art. 905.5(g); Miss. Code Ann. § 99-19-101(6)(d); Mo. Rev. Stat. § 565.032(3)(4); Mont. Code Ann. 46-18-304(6); Neb. Rev. Stat. § 29-2523(2)(e); N.H. Rev. Stat. Ann. 630:5(IV)(c); N.C. Gen. Stat. § 15a-2000(f)(4); 42 Pa. Cons. Stat. § 9711(E)(7); S.C. Code Ann. § 16-3-20(C)(b)(4); Tenn. Code Ann. § 39-13-204(j)(5) (1989 enactment); Utah Code Ann. § 76-3-207(3)(f); Vt. Stat. Ann. tit. 13 § 2303(e)(3); Wash. Rev. Code § 10.95.070(4); Wyo. Stat. § 6-2-102(j)(iv). *See also* Ill. Rev. Stat. ch. 38, para. 9-1(c)(5) (defendant not present during commission of the act causing death);

Md. Ann. Code art. 27, § 413(g)(6) (defendant's act is not the sole proximate cause of victim's death); Ohio Rev. Code Ann. § 2929.04(B)(6) (degree of offender's participation to be considered as mitigating factor).

Fifteen states have statutory "catch all" mitigating circumstance provisions:

Cal. Penal Code § 190.3(k) (any other circumstance which extenuates the gravity of the crime); Colo. Rev. Stat. § 16-11-103(4)(l) (any other evidence bearing on question of mitigation); Conn. Gen. Stat. §§ 53a-46a(b), (d) (any mitigating factor); Idaho Code § 19-2515(d) (all relevant evidence in mitigation); Ind. Code § 35-50-2-9(c)(8) (any other circumstances appropriate for consideration); Ky. Rev. Stat. Ann. § 532.025(2) (any mitigating circumstances otherwise authorized by law); La. Code Crim. Proc. Ann. art. 905.5(h) (any other relevant mitigating circumstance); Md. Ann. Code art. 27, § 413(g)(8) (any other facts); N.H. Rev. Stat. Ann. § 630:5(VI)(i) (other factors in defendant's background or character); N.C. Gen. Stat. § 15A-2000(f)(9) (any other circumstance arising from

the evidence); Ohio Rev. Code Ann. § 2929.04(B)(7) (any other factors that are relevant); 42 Pa. Cons. Code § 9711(E)(8) (any other evidence of mitigation); Tenn. Code Ann. § 39-13-204(j)(9) (any other mitigating factor) (1989 enactment); Utah Code Ann. § 76-3-207(3)(g) (any other fact in mitigation); Wyo. Stat. § 6-2-102(j)(viii) (any other fact or circumstance).

APPENDIX B

California Attorney General's Office
Pending Capital Litigation on Direct Appeal
Including Felony Murder Convictions
and Special Circumstances (Apr. 1993)

Number of Felony Murder Capital Offense Convictions
Involving Felony Murder Special Circumstances

1 Felony Murder Special Circumstance	37
1 Felony Murder Special Circumstance Plus Other Special Circumstance(s)	37
2 Felony Murder Special Circumstances	28
2 Felony Murder Special Circumstances Plus Other Special Circumstance(s)	25
3 Felony Murder Special Circumstances	8
3 Felony Murder Special Circumstances Plus Other Special Circumstance(s)	4
4 Felony Murder Special Circumstances	4
4 Felony Murder Special Circumstances Plus Other Special Circumstance(s)	3
Total Felony Murder Special Circumstance Cases	146
(% of total cases pending on appeal)	(68%)
Total cases pending on direct appeal	212

* * *

California Penal Code § 189 provides, in pertinent part, for first-degree felony murder:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or *which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under [Penal Code] Section 286, 288, 288a, or 289,* is murder of the first degree; and all other kinds of murders of the second degree.

California Penal Code § 190.2(a)(17) provides for the special circumstance of felony murder:

> The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:
>
> (i) Robbery in violation of [Penal Code] Section 211 or 212.5.
>
> (ii) Kidnapping in violation of Section 207 or 209.
>
> (iii) Rape in violation of Section 261.
>
> (iv) Sodomy in violation of Section 286.
>
> (v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of subdivision (b) of Section 451.

(ix) Train wrecking in violation of Section 219.

(x) Mayhem in violation of Section 203.

(xi) Rape by instrument in violation of Section 289.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can a state constitutionally make felony murder a capital offense without other aggravating circumstances?

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

The critical question is whether the death-eligible class has been narrowed, not whether an element is "duplicated" 4

II

The felony-murder circumstance adequately narrows the eligible class 8

A. History of "narrowing" 9

B. Blood temperature 10

C. Felony murder 13

1. The limitations of knowledge 14

2. The victim as witness 16

3. Public fear 18

D. Statistical prevalence 20

E. Valid narrowing 22

Conclusion 25

Appendix A

TABLE OF AUTHORITIES

Cases

Arave v. Creech, 123 L. Ed. 2d 188,
113 S. Ct. 1534 (1993) 13

Blodgett v. Campbell, No. A-851
(U. S. May 17, 1993) 22

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110 S. Ct. 1190 (1990) 17

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110 S. Ct. 1212 (1990) 17

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197 Cal. Rptr. 79, 672 P. 2d 862 (1983) 21

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97 S. Ct. 2861 (1977) 20

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109 S. Ct. 1591 (1989) 23

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102 S. Ct. 3368 (1982) 23

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92 S. Ct. 2726 (1972) 4, 5, 10, 20, 23

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100 S. Ct. 1759 (1980) 6, 12, 13, 19

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112 S. Ct. 1652 (1992) 22

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96 S. Ct. 2909 (1976) 17

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111 S. Ct. 2680 (1991) 22

In re Blodgett, 116 L. Ed. 2d 669,
112 S. Ct. 674 (1992) 22

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(Tex. Crim. App. 1989) 17

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96 S. Ct. 2950 (1976) 5, 10

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110 S. Ct. 3092 (1990) 13, 22

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25 S. Ct. 539 (1905) 25

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108 S. Ct. 546 (1988) 5, 13

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742 P. 2d 1306 (1987) 21

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99 S. Ct. 2450 (1979) 16

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111 S. Ct. 2491 (1991) 24

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(Tenn. 1992) 2, 3, 4, 6, 8, 14, 15, 18, 23

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107 S. Ct. 1676 (1987) 9, 16, 17, 23

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Statutes

Cal. Penal Code § 37 20

Cal. Penal Code § 189 ..... 6, 20

Cal. Penal Code former § 190 10

Cal. Penal Code § 190.2 ..... 6, 21, 22

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Cal. Penal Code § 192 11

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves an attack on a punishment with deep roots in American law: capital punishment in a case of felony murder where the state is unable to establish premeditation beyond a reasonable doubt. Such a radical change in the law would cause a vast disruption in the administration of criminal justice.

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1. Both parties have consented in writing to the filing of this brief.

More importantly, such a rule would seriously weaken the deterrent effect of capital punishment in those cases where it is most needed. It would remove a major incentive for felons not to kill their victims. The result is contrary to the rights of victims which *amicus* CJLF was formed to protect. *Amicus* therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

The facts are stated in the opinion of the Tennessee Supreme Court, *State* v. *Middlebrooks*, 840 S. W. 2d 317 (1992). Kerrick Majors, 14 years old, and four friends were looking at items offered in a "flea market" by defendant Donald Middlebrooks, his wife Tammy, and their 16-year-old companion, Roger Brewington. Tammy yelled at them "Hey, leave our stuff alone." The boys ran, and defendant and Brewington caught Kerrick. When Kerrick protested, Brewington said, "Shut up, you nigger." *Id.*, at 323-324.

According to Middlebrooks' statement, Brewington suggested they "have some fun" with Kerrick. The trio's idea of "fun" was torture. Together, they slapped Kerrick, beat him with brass knuckles, hit him with a stick, urinated in his mouth, burned him with a cigarette lighter, hit him on the testicles, threatened him with castration, sodomized him with a stick, and stabbed him to death. The ordeal lasted three and a half hours. *Id.*, at 324-325.

Middlebrooks claimed that Brewington was the dominant actor. Neither Brewington nor Tammy testified. Even by Middlebrooks' own statement, however, he willingly participated in the torture and inflicted the final, fatal wound "to prove to Roger that I guess I was cooler." *Id.*, at 324.

The jury convicted Middlebrooks of first-degree murder in the perpetration of a felony and aggravated kidnapping, but returned verdicts of not guilty of premeditated murder, armed robbery, and aggravated sexual battery. *Id.*, at 325. In the penalty phase, the prosecution introduced Middlebrooks' written "Justifiable Death Plan" to torture and kill law enforcement officers in revenge for their perceived "offenses" against him. *Ibid.*

The jury found two statutory aggravating circumstances: "(1) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind . . ., and that (2) the murder was committed while the defendant was engaged in committing a felony." *Id.*, at 325-326. The jury found that the aggravating circumstances outweighed the mitigating and accordingly sentenced Middlebrooks to death. *Id.*, at 326.

The Tennessee Supreme Court reversed. It found that the felony-murder aggravating circumstance "does not narrow the class of death eligible murderers sufficiently under the Eighth Amendment to the U. S. Constitution, and Article I, § 16 of the Tennessee Constitution[2] because it duplicates an element of the offense" of felony murder. *Id.*, at 346.

SUMMARY OF ARGUMENT

"Duplication" of an element is a bogus issue. Whether a statutory system does or does not "narrow" depends on whether it numerically reduces the death-eligible class to a number substantially less than the class of all murderers. When there are several different types of murder, selection of one of them as "death-eligible" does narrow the class.

Felony murder, by itself, is both mathematically and morally valid as a "narrowing" circumstance. Felony murder is substantially less common than heat-of-argu-

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2. The parties dispute whether the decision rests on independent state grounds. *Amicus* will not brief that issue, because we do not believe additional argument on the point will be helpful to the Court.

ment murder. It is a kind of murder for which the deterrent effect of capital punishment is particularly needed. It causes more fear and more damage to society than the typical murder.

ARGUMENT

I. The critical question is whether the death-eligible class has been narrowed, not whether an element is "duplicated."

The state court in this case initially identified the question as whether the statute "sufficiently narrow[s] the population of death-eligible defendants under the Eighth Amendment . . . ." *State* v. *Middlebrooks*, 840 S. W. 2d 317, 341 (Tenn. 1992). Having thus correctly identified the question, however, the court was immediately side-tracked by the bogus issue of "duplication." *Ibid.* It makes no difference whatever, *amicus* submits, that the same fact that makes a killing murder also makes it death-eligible murder, so long as the death-eligible class is smaller than the class of murderers generally and so long as the separation is made on a basis which is both rational and not forbidden by the Constitution.

The evil exposed in *Furman* v. *Georgia*, 408 U. S. 238 (1972) was the result of two concurrent causes: the breadth of offenses for which death was an available punishment and the lack of guidance for selecting those actually sentenced to death from the eligible offenders.

> "[T]he risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty. When the *Furman* case was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnaping and . . . murder in that class." *Walton* v. *Arizona*, 497 U. S. 639, 715 (1990) (Stevens, J., dissenting).[3]

To address this problem, the post-*Furman* statutes all have some form of "narrowing" for the crime of murder, and this Court has several times referred to narrowing as a constitutional requirement. See *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988).

For a proper description of the "narrowing" function, we turn once again to the Georgia Supreme Court's classic answer to the certified question in *Zant*, *supra*, 462 U. S., at 870-872. The Georgia court used a metaphor of a pyramid, separated into levels by various planes. The severity of the punishment increased at each level.

The first plane separated murders from manslaughters and noncriminal homicides. *Id.*, at 871. This is an ancient division, going back to Henry VIII. See *post*, at 9.

The second plane, and the critical one for the present discussion, separates death-eligible murderers from those who may be sentenced only to prison. Georgia achieves this division through "aggravating circumstances." *Ibid.* Georgia does not divide murder into degrees. Ga. Code Ann. § 16-5-1. In Texas, the same division is accomplished by the definition of capital murder. See *Jurek* v. *Texas*, 428 U. S. 262, 270 (1976). The final plane, not at issue here, separates death-eligible defendants sentenced to death from those sentenced to life in prison. *Zant*, *supra*, 462 U. S., at 871.

It is worth noting at this point that many states insert an extra plane of division, although it is not constitutionally required. Many states both separate murder into

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3. Justice Stevens actually understated this point by including the qualifier "first-degree." *Ibid.* Georgia does not divide murder into degrees, and Furman was simply convicted of murder. *Furman*, *supra*, 428 U. S., at 239.

degrees *and* require an "aggravating" or "special" circumstance for death eligibility. See, *e.g.*, Tenn. Code Ann. §§ 39-13-202, 39-13-204(i); Cal. Penal Code §§ 189, 190.2; *Lowenfield*, *supra*, 484 U. S., at 246. *Lowenfield* established that insertion of this additional plane does not draw additional constitutional scrutiny. *Ibid*. Nor should it. The additional plane of division is to the benefit of defendants, further narrowing the eligible class. For such a salutary requirement to draw additional scrutiny would make no sense.

For the pyramid to perform as it should, the plane or planes need to provide a meaningful separation. That is, a substantial number of murderers need to be held in the lower, death-ineligible level or levels. A circumstance which is so vague that it could be applied to all murders fails to perform this function, and hence is invalid. *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429 (1980) (plurality); *Zant*, *supra*, 462 U. S., at 878.

A circumstance which necessarily applies to all murders (*e.g.*, the death of victim) would similarly fail to provide a meaningful division, or indeed any division at all. The problem is not "duplication" of an element *as such*, but rather the *result* of that duplication, shrinking the set of death-ineligible murderers to the empty set. To use the *Zant* pyramid metaphor, the two planes are drawn in the same place, with no level between them.

Duplication of an element does not inherently result in collapsing the levels of the pyramid when the element is only one of several alternatives. In that case, the same factor can move the case two levels up in the pyramid while still providing a meaningful separation. To illustrate, let us consider five hypothetical Tennessee homicide cases: A, B, C, D, and E:[4]

4. For convenience, we refer to the present Tennessee statutes rather than those in effect at the time of the crime. The state court did not regard the changes as important to its analysis. See 840 S. W. 2d, at 345.

- A's killing occurred suddenly in the heat of an argument, "in a state of passion produced by adequate provocation. . . ." This is manslaughter. Tenn. Code Ann. § 39-13-211(a).
- B's killing also occurred suddenly in the heat of an argument. It is found to be unlawful and intentional, and not on adequate provocation, but not premeditated and not in the course of another felony. Thus, it is second-degree murder. See *id*., § 39-13-210(a).
- In C's case, another argument murder, the evidence showed multiple shots in the victim's skull, fired from behind. This is sufficient to establish "premeditation." See *id*., § 39-13-202(a)(1); *State* v. *Caldwell*, 671 S. W. 2d 459, 463 (Tenn. 1984). This is first-degree murder, but there are no statutory aggravating circumstances. See Tenn. Code Ann. § 39-13-204(i). Hence, the offense is not death-eligible.
- D robbed a convenience store. The store clerk was found dead with a bullet in his head. D is proved to have gone armed to the store with the intent to rob it, and forensic evidence establishes that he was the shooter. The exact circumstances of the shooting cannot be established, because there are no living witnesses other than D. The jury is able to find recklessness from D's proven conduct. This is felony murder and hence first degree. Tenn. Code Ann. § 39-13-202(a)(2). An aggravating circumstance is also true. *Id*., § 39-13-204(i)(7).
- E, an adult, murders a child under 12 intentionally, willfully, deliberately, and with premeditation. This is first-degree murder with an aggravating circumstance. *Id*., § 39-13-204(i)(1).

The Tennessee statutory system definitely does provide a separation. D and E may be sentenced to death, if the jury so decides, while A, B, and C may not, regardless of how the jury feels about them or their conduct. That separation is made on the basis of objective criteria and

not on the jury's unguided placement of the crime on an unmarked continuum. Cf. *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988).

People may legitimately differ as to whether D's conduct really *should* be considered more severely punishable than C's. The Tennessee Supreme Court was evidently troubled by a legislative value judgment which conflicts with its own opinion as to relative blameworthiness. See *State* v. *Middlebrooks*, *supra*, 840 S. W. 2d, at 345. This value disagreement, however, has nothing to do with the question of whether the statute "narrows." The statute *does* narrow the death-eligible class, because it excludes from the death penalty all second-degree murderers and all those who commit premeditated murder under none of the circumstances listed in the statute. See Tenn. Code Ann. § 39-13-204(i)(1)-(12). The "size of the class of convicted persons who are eligible for the death penalty," *Walton*, *supra*, 497 U. S., at 715 (Stevens, J., dissenting), is reduced. The fact that the subclass of murderers convicted under the felony-murder rule is not *separately* narrowed is simply irrelevant.

Given that the statute does narrow, the remaining question is whether it *adequately* narrows to meet the requirements of *Furman*. *Amicus* believes it does, for the reasons stated in the next part.

II. The felony-murder circumstance adequately narrows the eligible class.

Felony murder, by itself, is a valid "narrowing" circumstance, both morally and mathematically. It is morally valid because it is related to culpability in a way rational people may believe to be appropriate. It is mathematically valid because it significantly reduces the death-eligible class.

A. History of "Narrowing."

The notion of narrowing the application of capital punishment, in terms of both the offense and the offender, has a long history. The first distinction was the "benefit of clergy." Originally this was an exemption from secular punishment for true clergymen, but by Blackstone's time the benefit had become an exemption from capital punishment for all first offenders. See 4 W. Blackstone, Commentaries *367 (1769).

At the same time the benefit was being extended to more offenders, it was being restricted to fewer offenses. By statute in the reign of Henry VIII, the benefit was withdrawn from murder with "malice prepense." 23 Hen. 8, ch. 1, §§ 3, 4 (1531); 1 Edw. 6, ch. 12, § 10 (1547); see *Tison* v. *Arizona*, 481 U. S. 137, 156 (1987). Thus began the distinction between murder and manslaughter.

As time went on, a variety of other circumstances came to be classified as murder, even though they did not meet the literal requirement of "malice aforethought." These included killing in the heat of passion upon a provocation deemed inadequate, killing in the course of a felony (felony murder), and killing by extremely negligent conduct ("depraved heart"). 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.1, at 182-183 (1986). All of these killings were thus felony without benefit of clergy (*i.e.*, capital offenses) in England and, initially, in America.

In 1794, Pennsylvania legislatively divided murder into degrees. 1794 Pa. Laws ch. 1777. This reform was widely copied. *McGautha* v. *California*, 402 U. S. 183, 198 (1971). The purpose of the division was, once again, to

separate capital from noncapital murder.[5] Yet statutory narrowing proved insufficient, and jury discretion was added to replace rampant jury nullification. "Except for four States that entirely abolished capital punishment . . ., every American jurisdiction has at some time authorized jury sentencing in capital cases." *Id.*, at 200, n. 11.

Then came the case of *Furman* v. *Georgia*, 408 U. S. 238 (1972). Two of the defendants in that case had been convicted of rape, and the third was convicted of murder in a state which did not divide murder into degrees. *Id.*, at 239. Thus the adequacy of narrowing by the conventional definition of first-degree murder was not presented in *Furman*. Even so, it was widely believed after *Furman* that further narrowing was necessary. Every discretionary sentencing system reviewed by this Court since *Furman* has either defined its highest degree of murder more narrowly than the traditional "first degree" or has required an additional "aggravating" or "special" circumstance. See *Jurek* v. *Texas*, 428 U. S. 262, 270 (1976) (discussing two techniques of narrowing).[6]

B. Blood Temperature.

One consistent theme throughout the history of narrowing has been the distinction between the "hot-blooded" and "cold-blooded" killings. Though physiologically inaccurate, these terms have been understood by common folk, both ancient and modern, as a valid distinction between types of killings. See 1 W. Hawkins,

5. For example, as originally enacted in 1872, California Penal Code section 190 provided: "*Every* person guilty of murder in the first degree shall suffer death, and *every* person guilty of murder in the second degree is punishable by imprisonment in the State Prison not less than ten years." (Emphasis added).

6. The only state in the 1976 cases not to "narrow" beyond the traditional degrees was North Carolina. The statute there was struck down because it was mandatory, not because the death-eligible class was too broad. *Woodson* v. *North Carolina*, 428 U. S. 280, 286, 305 (1976).

Pleas of the Crown, ch. 31, §§ 21, 29, at 80, 82 (1724); *United States* v. *Frady*, 456 U. S. 152, 170, n. 18 (1982). The distinction, and the difficulties with it, shed light on the need for the felony-murder rule.

The quintessential manslaughter is the killing "upon a sudden quarrel." See Cal. Penal Code § 192(a); 1 Hawkins, *supra*, ch. 30, § 1, at 76. With no prior design to commit any crime, two people get in a fight, the fight escalates to deadly force, and one of them is dead. This is the scenario that is uniformly considered to be a less culpable offense.

Yet the distinction between hot- and cold-blooded killings did not remain, by itself, the distinction between murder and manslaughter. Some people are excessively prone to fighting and react with extreme violence to insignificant or imagined slights. For such cases, manslaughter is too lenient a verdict. Thus, the law of manslaughter developed the requirement of "reasonable provocation," with a complicated body of law on what is "reasonable." See 2 LaFave & Scott, *supra*, § 7.10(b), at 255-264; 1 Hawkins, *supra*, ch. 31, § 33, at 82.

The division of murder into degrees was largely an effort to once again distinguish those cases that would have been manslaughter under a narrow interpretation of the malice requirement. The similarity of the modern statutory term "premeditation" to the old "malice prepense" is not an accident. See 2 LaFave & Scott, *supra*, § 7.1(a), at 182, n. 4.

However, the concept of "premeditation" soon suffered a dilution similar to the one which happened with "malice."[7] No particular amount of time is required, and the premeditation may last only a few seconds. *Id.*, § 7.7(a), at 237. Many commentators doubt whether the premeditation requirement, so diluted, provides any

7. Statutes typically require that the killing be "willful" and "deliberate" as well, which adds little or nothing.

meaningful separation. Justice Cardozo considered the distinction incomprehensible to juries. B. Cardozo, Law and Literature and Other Essays 99-100 (1931). This Court has called the concept "amorphous." *Woodson*, *supra*, 428 U. S., at 290-291. The Model Penal Code abandons the concept of premeditation. American Law Institute, Model Penal Code and Commentaries, part II, vol. 1, § 210.2, at 20 (1980).

The result of this double dilution is that killing upon a sudden quarrel can span three degrees of crime, depending on the jury's view of the reasonableness of the provocation and the inner workings of the defendant's mind. This is a considerable problem, because arguments are far and away the predominant contributing circumstance of willful homicides. One study found that of all willful homicides with a known contributing circumstance, nearly half resulted from arguments. California Dept. of Justice, Homicide in California 1988, at 26. That is nearly triple the proportion of the second most common circumstance, felony murder. *Ibid*.

The post-*Furman* statutes have attempted to further narrow the death-eligible class. The aggravating circumstances and definitions of capital murder vary widely from state to state. If we read between the lines of the aggravating circumstances to see what is *not* capital murder, however, we find some consistency. Two kinds of murder are generally excluded from capital punishment, provided the defendant has committed no other murder, either concurrently or previously. First, there is the defendant who kills suddenly in a moment of anger. The second kind excluded is the "depraved heart" murder, where the defendant intends no felony at all, but acts with gross indifference to human life. See generally 2 LaFave & Scott, *supra*, § 7.4, at 199-206.

Godfrey v. *Georgia*, 446 U. S. 420 (1980) illustrates the problems that arise when a statute fails to exclude the simple heat-of-anger killing. Godfrey shot his estranged

wife and her mother immediately after a heated argument over the terms of divorce. *Id*., at 425. Georgia's "outrageously or wantonly vile" aggravating circumstance failed to distinguish the case in a principled way from noncapital cases. *Id*., at 432-433.[8]

States which have preserved similar aggravating circumstances have done so only by narrowing the circumstance to exclude the simple killing in anger. Florida, at least initially, required an additional element that the crime be "unnecessarily torturous." See *Proffitt* v. *Florida*, 428 U. S. 242, 255 (1976). Arizona required that the killer relish the killing, an emotional state quite different from the hot temper of *Godfrey*. See *Lewis* v. *Jeffers*, 497 U. S. 764, 777, 783 (1990). Idaho required a finding that the killer was "cold-blooded" and "pitiless," which meant a killing without emotion. *Arave* v. *Creech*, 123 L. Ed. 2d 188, 199, 113 S. Ct. 1534, 1541 (1993).[9]

C. Felony Murder.

Murder with the specific intent to kill is the most common species of murder, but it is not the only one. The other type which is commonly involved in capital cases is felony murder.[10]

Probably no other aspect of American law has such universal legislative acceptance in the face of such a

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8. On the facts of the case, multiple murder was a clear, simple, and thoroughly rational ground of distinction, but Georgia had no such statutory circumstance. See *id*., at 432-433, n. 15; cf. *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988) (multiple victims constitutes valid narrowing circumstance).

9. It is worth noting that these latter two statutes, which come closest to the constitutional line, also come closest to including simple heat-of-anger murder.

10. Other types include intent to do serious bodily harm and "depraved heart" murder, see 2 LaFave & Scott, *supra*, §§ 7.3-7.4, at 197-206, but these are rarely capital cases.

deluge of academic criticism as the felony-murder rule. The rule is the law in all but three American jurisdictions. 2 LaFave & Scott, *supra*, § 7.5, at 233. Yet the commentary is almost uniformly hostile. See *Middlebrooks*, *supra*, 840 S. W. 2d, at 337 (citing critical articles). Where such a difference occurs, it is likely that the academics have lost touch with an important "real world" fact. So it is with felony murder. Academic critics tend to make several errors. First, they ignore the limits of factual knowledge. Second, they look at crime from the standpoint of what to do with the prisoner before the court, without considering the impact on future victims. Third, they fail to consider the broader impact of crime on society.

1. The limitations of knowledge.

Intent to kill is not an element of felony murder. Many theoreticians therefore approach the topic as if accidental killings were the norm in this area. Professor LaFave, after citing figures on the statistical occurrence of homicide during felonies, makes this remarkable statement: "These statistics, of course, do not even reflect how many of the homicides were committed purposely, knowingly or recklessly (*which would clearly be subject to prosecution without the felony-murder rule*) and how many were negligent or accidental." 2 LaFave & Scott, *supra*, § 7.5(h), at 232, n. 131 (emphasis added).

Professor LaFave is dead wrong. A killing during a robbery is not "clearly . . . subject to prosecution" as intent-to-kill murder merely because it *was*, *in fact*, intentional, or even premeditated. It is only subject to such prosecution if the state has *evidence* establishing beyond a reasonable doubt that the killing was intentional.

We often do not know the precise circumstances of the killing, because the defendant has killed the only honest witness. In cases with multiple defendants, we

may have the testimony of an accomplice, but the problems with such testimony are well known.

In the present case, neither of the accomplices testified. The only version we have of the event is defendant's statement. He claims that he, a grown man, was a passive participant, while the dominant figure in the crime was a 16-year-old boy. Lacking any testimony to the contrary, the jury did not find premeditation proved beyond a reasonable doubt. *Middlebrooks*, *supra*, 810 S. W. 2d, at 324-235.

Where lack of evidence makes the difference between guilt and innocence, our tradition demands adherence to the maxim that it is better to let ten guilty people go free than to convict one innocent person. See 4 W. Blackstone, Commentaries *358 (1769). In felony murder, however, the difference lies not between innocence and guilt but between one proven and highly culpable[11] *mens rea* (intent to commit a dangerous felony) and another highly likely but often unprovable *mens rea* (intent to kill).[12] The felony-murder rule is society's judgment that a conviction for murder in those rare cases of truly accidental death during a felony is not so harsh as to justify the rampant injustice of rewarding intentional felony-murderers for exterminating the witness. Accident is, of course, a proper mitigating circumstance to consider in proceedings for sentencing, parole, or clemency, and it

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11. Professor Rosen's assertion that a conviction of felony murder does not constitute *any* culpability finding, Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C.L. Rev. 1103, 1127 (1990), is patently absurd.

12. Even Professor Rosen admits that "few" felony-murder defendants do not intend to kill. *Id.*, at 1131. Lack of intent is more common in "nontriggermen," of course. *Amicus* will not brief that aspect of the felony-murder problem, because it is not presented by the facts of this case and because it has been thoroughly covered in other decisions of this Court. See *post*, at 23.

is a constitutionally required consideration in capital cases. See *Tison* v. *Arizona*, 481 U. S. 137, 156 (1987).

The Model Penal Code implicitly recognizes the evidentiary basis of the felony-murder rule. The Code would abolish felony murder as a separate category. Instead, the prosecution would charge reckless murder, and the commission during a felony would raise a rebuttable presumption of recklessness. "The effect of the Model Code, therefore, is to abandon felony murder as a separate basis for establishing liability for homicide and to retain the presumption described above as a concession to the facilitation of proof." Model Penal Code and Commentaries, *supra*, § 210.2, at 30. This salutary reform would go a long way toward answering the objections to the felony-murder rule while retaining its utility. Regrettably, it is now precluded by *Sandstrom* v. *Montana*, 442 U. S. 510 (1979) and its progeny. See *Yates* v. *Evatt*, 114 L. Ed. 2d 432, 447-448, 111 S. Ct. 1884, 1891-1892 (1991) (cannot presume malice from use of deadly weapon).

Faced with a choice between shouldering the full burden of proof of the element of intent to kill and eliminating or reducing that element, legislatures have overwhelmingly chosen the latter. For a more complete understanding of why, *amicus* asks the Court to consider the plight of the felony victim.

2. The victim as witness.

We tend to think of sentencing in the courtroom context. The defendant stands in court in jail garb. He is heavily guarded and possibly shackled. He presents little or no immediate danger, as lawyers debate what should be done with him.

Amicus asks the Members of this honorable Court to consider for a moment a different picture. See felony-murder defendants as the victims see them. Think of John and Donnelda Lyons in the Arizona desert, begging for their lives while the Tison gang decides what to do

with them and their family. See *Tison* v. *Arizona*, 481 U. S. 137, 137-141 (1987). Think of Jack Huddleston lying on the floor in the convenience store cooler in Snyder, Texas while Dorsie Johnson holds a gun to the back of his head. *Johnson* v. *State*, 773 S. W. 2d 322, 324 (Tex. Crim. App. 1989), *pending sub nom.*, *Johnson* v. *Texas*, No. 92-5653. Think of Dickie Gibson, begging for his life in the orange grove in Riverside, California while Richard Boyde orders him to kneel. See *Boyde* v. *California*, 494 U. S. 370, 372-374 (1990). Think of Pamela Lane and what was going through her mind as Horace Butler raped her at gunpoint. See *Butler* v. *McKellar*, 494 U. S. 407, 409-410 (1990).

What both the victim and the felon understand in this interval is that the felon has a powerful incentive to kill the victim. Robbery, rape, and kidnapping are serious offenses and severely punished. The felon can substantially reduce his chance of capture by eliminating the witness. What the victim needs at this point is a powerful incentive for the felon *not* to kill him or her.

Capital punishment for felony murder is such an incentive. To be sure, it is not perfect. Substantial numbers of felons will decide that reducing the risk of capture is worth incurring the risk of execution. Others might be deterred by life in prison.

Yet it would defy reason to assume that of all the rapes and robberies and kidnappings committed in this country *no* perpetrator will *ever* be deterred from killing the victim by a substantial, credible threat of capital punishment. Common sense tells us the opposite. See *Gregg* v. *Georgia*, 428 U. S. 153, 186, n. 33 (1976).

The deterrent is weakened by a requirement that intent and premeditation be proved by the prosecution. In some cases, to be sure, such proof will be available from the manner of the killing, accomplice testimony, or a confession. In others, however, it will not. In killing

the victim, the defendant eliminates the proof of premeditation.

Once more, *amicus* asks, *see this crime through the victim's eyes*. Think of Kerrick Majors, 14 years old, kidnapped, bound, dragged to the woods, beaten with sticks and brass knuckles, burned with a lighter, threatened with castration, sodomized with a foreign object, and slashed with a knife. See *Middlebrooks*, *supra*, 840 S. W. 2d, at 324. Imagine his terror, not knowing what they will do next, but knowing they have a powerful reason to kill him.

Defining felony murder by itself as a capital offense is society's effort to tilt the balance *in favorem vitae* for the *victim* for once. Society certainly has a legitimate interest in giving the felon a powerful reason to keep the victim alive. This interest provides an eminently rational basis for including felony murder in the most severely punished class of crimes.

3. Public fear.

One of the relevant considerations in capital sentencing is the crime's "impact on the victim's family *and community*." *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 739, 111 S. Ct. 2597, 2611 (1991) (O'Connor, J., concurring) (emphasis added). *Payne* dealt with impact at the individual level, but the principle is equally valid at the categorical level. Felony murder is distinguishable from heat-of-argument murder because it has a greater and more detrimental impact on the community. Felony murder causes more fear.

As noted *ante*, at 12, killings arising from arguments are the most common type. Yet these are, by and large, not the cases that strike fear into the hearts of the people. "[T]hose [crimes] committed randomly, such as street muggings, caused greater anxiety than those in which the motivation was personal, such as the murder of a spouse."

Study Shows Public Frightened Most by Random, Local Crimes, 15 Crim. Just. Newsl. 4 (Oct. 1, 1984).

The difference is control over our lives, or at least the perception of control. See C. Silberman, Criminal Violence, Criminal Justice 16 (1978). Reading of a case such as *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) does not leave us with that sinking feeling that we may be next. Peaceful, law-abiding people can, to a large extent, avoid such crimes by avoiding violent people and by managing our disputes in such a way that tempers do not reach the boiling point.

Robbery is different. People are robbed simply because they possess some item the robber wants. Fear of this crime is greatly compounded by the fear of being injured or murdered by the robber. That fear is well founded. Thirty percent of robbery victims are injured, and about 2000 a year are murdered. Cook, Robbery Violence, 78 J. Crim. L. & Criminology 357, 357 (1987).

When people say they fear crime, felony murder is a very large component of that fear. The toll this fear takes on our quality of life is staggering. A third of all Americans limit the places or times we will go shopping. U. S. Bureau of Justice Statistics, Sourcebook of Criminal Statistics—1991, at 198 (1992). Three-fifths of the entire population limit the places we will go by ourselves. *Ibid*. About the same number are fearful of being attacked or robbed when out alone at night in our own neighborhoods. *Ibid*. More ominously, 18 percent of us have armed ourselves, *ibid*., and a full third of Americans think vigilantism is sometimes justified. *Id*., at 199.

Felony murder, as a category, inflicts a different and greater harm on society than does murder arising out of a personal argument. This greater harm is an indepen-

dent, thoroughly rational basis for making it a death-eligible category of murder.[13]

D. Statistical Prevalence.

The problem identified in *Furman* v. *Georgia*, 408 U. S. 238 (1972) was in part a numerical one. The number of people sentenced to death was only a tiny fraction of those eligible. See *ante*, at 4.

The largest step toward fixing this problem was simply eliminating capital punishment for all commonly occurring crimes other than murder. This was done by statute in most states after *Furman*, see *Coker* v. *Georgia*, 433 U. S. 584, 594 (1977), and *Coker* took care of the rest, *id*., at 600.[14]

Gathering statistics for various types of murder is complicated by the variations in definitions among the states. The FBI's crime index, consequently, lumps all willful homicide together. See Sourcebook, *supra*, 742. For the purpose of this discussion, *amicus* has obtained data from California, which, as the largest state, provides the largest sample of cases from within a single jurisdiction. California has the traditional definition of first-degree murder. See Cal. Penal Code § 189. Felony

13. In a society which remains largely segregated in social relationships, felony murder is more likely to involve a murderer and victim of different races than is murder arising from personal enmity. Rosen wrings his hands over this, Rosen, *supra*, 31 B.C.L. Rev., at 1117-1120, but it is not an equal protection issue so long as criminals *within* each category are treated equally. See Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33 (1991) (no measurable bias once other factors accounted for). Rosen's concerns appear to be based on the abhorrent notion that the numbers themselves are the goal, rather than equal treatment of similarly situated people.

14. Death penalty statutes for some exotic offenses remain on the books, see, *e.g.*, Cal. Penal Code § 37 (state treason), but these have no significant effect on the numerical problem, see *Woodson* v. *North Carolina*, 428 U. S. 280, 292, n. 25 (1976) (no convictions of these offenses).

murder is a capital offense without a finding of premeditation, Cal. Penal Code § 190.2(a)(17), although for a few years case law required a finding of intent to kill, even for the actual killer, see *Carlos* v. *Superior Court*, 35 Cal. 3d 131, 153-154, 672 P. 2d 862, 877 (1983), overruled by *People* v. *Anderson*, 43 Cal. 3d 1104, 1147, 742 P. 2d 1306, 1331 (1987).

The data, from California Offender-Based Transaction Statistics, are summarized in Appendix A. They show that the narrowing "pyramid" does, in fact, work the way it is described in *Zant* v. *Stephens*. See *ante*, at 5-6. Half of all criminal homicides result in convictions of manslaughter rather than murder.[15] Of those that remain, about half are first-degree and half are second-degree, so first-degree murders are about one-quarter of homicide convictions.

Statistics for convictions of murder with "special circumstances" are not available in this database, but even comparing actual death sentences to first-degree murder convictions, we see that 11.7 percent of all first-degree murderers are sentenced to death. That is more than one in nine, far above the "capriciously selected random handful" mentioned in *Furman*. Thus, the mere division of murder into degrees, without special or aggravating circumstances at all, is sufficient to bring the proportion above the "handful" level.[16]

The use of special circumstance findings further narrows the death-eligible category. This effect can be estimated by looking at the prison population. In the summer of 1990, there were 807 California prisoners sentenced to life without parole. Sourcebook, *supra*, at

15. This is doubtless greater than the actual proportion of manslaughters, due to plea bargaining.

16. Although numerically adequate, the traditional definition of first-degree murder still suffers from the "amorphous" definition of premeditation. See *ante*, at 12.

652. We can safely assume that substantially all of them were death-eligible.[17] The population of death row in 1990 was between 253 and 280. U. S. Bureau of Justice Statistics, Capital Punishment 1990, at 6 (1991). Averaging the latter two numbers, it appears that there are about three life-without-parole prisoners per death row prisoner. Thus, approximately one-quarter of those who legally could have been sentenced to death actually were.

Thus, in a state which defines its death-eligible class as broadly as Tennessee, the numerical problem identified in *Furman* has been resolved. A sentence of death is a credible threat, being imposed in a very substantial fraction of the cases where it is legally possible.[18]

E. Valid Narrowing.

The task of deciding which categories of crime are most deserving of the most severe punishment is quintessentially a legislative function, and the judiciary is on thin ice whenever it intrudes into this area. See *Harmelin* v. *Michigan*, 115 L. Ed. 2d 836, 867, 111 S. Ct. 2680, 2703 (1991) (Kennedy, J., concurring in the judgment). There are, to be sure, some grounds for questioning legislative judgment, and more so in capital sentencing than in prison terms, see *ibid*., but the primacy of the legislature in this area must always be kept in mind. See *Lewis* v. *Jeffers*, 497 U. S. 764, 796, n. 11 (1990) (Blackmun, J., dissenting).

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17. That is, we assume that few, if any, are convicted of kidnap for ransom, Cal. Penal Code § 209(a); train wrecking, *id*., § 218; or murder of a transit worker, *id*., § 190.25, under circumstances not also qualifying under section 190.2(a)(17) paragraphs (i), (ii), or (ix).

18. Actual execution of the sentence is a different matter, and one not within the state's power to correct. See, *e.g.*, *Gomez* v. *United States District Court*, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992); *In re Blodgett*, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992); *Blodgett* v. *Campbell*, No. A-851 (U. S. May 17, 1993) (O'Connor, J., in chambers).

The most obvious limitation is the principle of equal protection. A statute which limited the death-eligible class on the basis of a "suspect" classification would clearly be invalid. *Furman* v. *Georgia*, 408 U. S. 238, 256 (1972) (opn. of Douglas, J.). No suspect classification is at work here. The distinction need only have a rational basis. *Dallas* v. *Stanglin*, 490 U. S. 19, 23 (1989).[19] Felony murderers are rationally distinguishable from other murderers, and there is a rational basis for believing that felony murder is a particularly aggravated form of murder. See *ante*, at 13-20. Indeed, the virtually unanimous judgment of those American legislatures which have divided murder into degrees, see 2 LaFave & Scott, *supra*, § 7.7, at 236, is enough by itself to compel this conclusion.

Public opinion is in accord. A national survey asked people to judge the severity of 204 crimes, including numerous types of homicide. Rape-murder was judged the second most severe of the entire group, and the single most severe crime against a lone victim. Only planting a bomb which kills 20 people was judged more serious. U. S. Bureau of Justice Statistics, The Severity of Crime 2 (1984).

A classification can also be attacked on the ground that capital punishment is disproportionate to the offense. For felony murder, this ground has been thoroughly plowed. See *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982) (disproportionate for minor accomplice with no intent to kill); *Tison* v. *Arizona*, 481 U. S. 137, 158 (1987) (not disproportionate for major participant with reckless indifference to life). Even accepting defendant's version of events for the sake of argument, the *Tison* standard is clearly met. Defendant is an actual killer who intended to kill, to prove he was "cooler." *Middlebrooks*, *supra*, 840 S. W. 2d, at 324.

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19. We trust no one will argue that there is a "fundamental right" to commit murder.

This leaves the *Furman* requirement. As expressed in *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983), "an aggravating circumstance must *genuinely narrow* the class of persons eligible for the death penalty and must *reasonably justify* the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (Emphasis added.) The second prong of this test adds little to the equal protection and proportionality issues discussed above. A reasonable justification for a greater penalty is not necessarily one that the judiciary agrees with. It is one that reasonable people might agree with.

Professor Rosen states flatly, "A simple felony murder, unaccompanied by any other aggravating factor, is not worse than a simple premeditated and deliberated murder." Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C.L. Rev. 1103, 1129 (1990). That is nothing more than Richard Rosen's personal opinion, and many people disagree. Given the amorphous nature of the "premeditation" inquiry, see *ante*, at 12, people can and do reasonably believe that a person who rapes a woman and then kills her is more culpable than one who reflects a mere moment before killing in the course of a heated argument.

A plurality of this Court rejected a related "moral disparity" argument in *Schad* v. *Arizona*, 115 L. Ed. 2d 555, 573, 111 S. Ct. 2491, 2503-2504 (1991):

> "Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, *it is clear that such equivalence could reasonably be found*, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense." (Emphasis added, footnote omitted.)

The reasonableness of this position is similarly sufficient to rule out the moral disparity argument here. The judiciary's "agreement or disagreement has nothing to do

with the right of a majority to embody their opinions in law." *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting). Nowhere in the Constitution is there a mandate to conform to the "better view" as pronounced from the ivory tower of the law reviews.

The only question, then, is whether the statute genuinely narrows. In the absence of a *Godfrey* vagueness issue, this is only a mathematical question. Does the statutory system as a whole reduce the death-eligible class to a meaningfully reduced subset of the entire class of murderers? The answer, *amicus* submits, is clearly yes.

The Tennessee system, taken as a whole, excludes simple cases of heat-of-argument killings. Such killings will generally not be first-degree murder unless they are found to be "intentional, premeditated and deliberate." Tenn. Code Ann. § 39-13-202(a)(1). Most of those which clear this hurdle will be excluded from the death penalty by the absence of any of the aggravating circumstances. See Tenn. Code Ann. § 39-13-204(i).

A very substantial portion of murderers are thus shielded from capital punishment. The data from California, which has a law of similar breadth, confirms that the numerical reduction is indeed meaningful. Felony murder, by itself, is a valid narrowing circumstance.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be reversed.

May, 1993

Respectfully submitted,

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Criminal Justice Legal Foundation

APPENDIX A

Year	First Degree Murder	Second Degree Murder	Voluntary Manslaughter	Involuntary Manslaughter	Total Homicide
1982	281	252	518	87	1138
1983	223	247	392	89	951
1984	230	212	406	93	941
1985	210	253	359	112	934
1986	254	248	444	122	1068
1987	261	240	417	110	1028
1988	245	265	380	100	990
1989	243	256	375	94	968
1990	232	279	346	78	935
1991	289	361	451	87	1188

Table 1. Convicted Offense for Persons Arrested in California and Convicted of Homicide

Data are from Offender-Based Transaction Statistics compiled by the California Bureau of Criminal Statistics. Data limitations and characteristics are described in California Dept. of Justice, Crime and Delinquency in California, 1991, at 171.

		Murder		1st Deg. Murder		Death Sentences			
Year	Total Homicide	Number	Percent of Total Homicide	Number	Percent of Total Homicide	Number	Percent of Total Homicide	Percent of Murder	Percent of Murder-1
1982	1138	533	46.8%	281	24.7%	38	3.3%	7.1%	13.5%
1983	951	470	49.4%	223	23.4%	34	3.6%	7.2%	15.2%
1984	941	442	47.0%	230	24.4%	27	2.9%	6.1%	11.7%
1985	934	463	49.6%	210	22.5%	16	1.7%	3.5%	7.6%
1986	1068	502	47.0%	254	23.8%	21	2.0%	4.2%	8.3%
1987	1028	501	48.7%	261	25.4%	25	2.4%	5.0%	9.6%
1988	990	510	51.5%	245	24.7%	34	3.4%	6.7%	13.9%
1989	968	499	51.5%	243	25.1%	33	3.4%	6.6%	13.6%
1990	935	511	54.7%	232	24.8%	33	3.5%	6.5%	14.2%
1991	1188	650	54.7%	289	24.3%	26	2.2%	4.0%	9.0%
Average			50.1%		24.3%		2.8%	5.7%	11.7%

Table 2. Percentages in Categories of Homicide.

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NO. 92-989

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF TENNESSEE,

PETITIONER,

v.

DONALD RAY MIDDLEBROOKS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF TENNESSEE AND BRIEF OF *AMICUS CURIAE*

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QUESTION PRESENTED

Does the Eighth Amendment prohibit the sentencer in a capital felony murder prosecution from considering as an aggravating circumstance the fact that the murder was committed in the perpetration of a felony?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

SUMMARY OF THE ARGUMENT viii

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF TENNESSEE 1

INTEREST OF *AMICUS CURIAE* 3

I THE HOLDING OF *STATE* v. *MIDDLEBROOKS*, 840 S.W.2d 317 (TENN. 1992), IS BASED ON AN INAPPROPRIATE APPROACH TO THE ISSUE OF WHO RECEIVES THE PENALTY OF DEATH 5

A. The proper role of aggravating circumstances in death penalty jurisprudence 5

B. Confusion of narrowing with proportionality in *State v. Middlebrooks* 8

C. *State* v. *Middlebrooks* uses an improper mechanical approach to assess the role of aggravating circumstances in the sentencing decision 12

D. Felony murder is a proper aggravating circumstance 18

II THE OPINION IN *STATE v. MIDDLEBROOKS*, 840 S.W.2d 317 (TENN. 1992), DUE TO ITS MISUNDERSTANDING AND MISAPPLICATION OF *ENMUND v. FLORIDA*, 458 U.S. 782, 102 S.Ct. 3368 (1982) AND *TISON v. ARIZONA*, 481 U.S. 137, 107 S.Ct. 1676 (1987) CREATES AN UNNECESSARY AND UNWISE EXTRA STEP TO THE DEATH PENALTY PROCESS 22

A. The Holdings of *Enmund v. Florida* and *Tison v. Arizona* and their effect on narrowing 22

B. The opinion in *State v. Middlebrooks* misapplies *Tison v. Arizona* and *Enmund v. Florida* 23

C. The importance of the difference for death penalty jurisprudence 25

III APPLICATION OF THE CORRECT AND APPROPRIATE CONSTITUTIONAL PRINCIPLES TO THE FACTS OF *STATE v. MIDDLEBROOKS* REQUIRES REVERSAL OF THE HOLDING OF *STATE v. MIDDLEBROOKS*, 840 S.W. 2d 317 (TENN. 1992) 25

A. Defendant Middlebrooks was sufficiently involved in the underlying felony 25

B. Defendant Middlebrooks had the required state of mind towards human life 27

C. The jury in this case had opportunity to show mercy 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Barclay v. Florida,
463 U.S. 939, 103 S.Ct. 3418 (1983) 14

Eddings v. Oklahoma,
455 U.S. 104, 113-115, 102 S.Ct. 869,
876-877 (1982) 11, 28

Enmund v. Florida,
458 U.S. 782, 102 S.Ct. 3368 (1982)
7, 20, 22, 23

Godfrey v. Georgia,
446 U.S. 420, 100 S.Ct. 1759 (1980) 6, 9

Gregg v. Georgia,
428 U.S. 153, 96 S.Ct. 2906 (1976) 10

Jurek v. Texas,
428 U.S. 262, 96 S.Ct. 2950 (1976) 14

Lockett v. Ohio,
438 U.S. 586, 604, 98 S.Ct. 2954,
2964 (1978) 11, 28

Lowenfield v. Phelps,
484 U.S. 231, 108 S.Ct. 546 (1988) 2, 15-18

Maynard v. Cartwright,
486 U.S. 356, 108 S.Ct. 1853 (1988) 5, 6

People v. Brown,
40 Cal.3d 512, 540, 709 P.2d 440,
455-456 (1985) 13-15

People v. Marshall,
50 Cal.3d 907, 945, 790 P.2d 676,
696-697 (1990) 17

People v. Webster,
54 Cal.3d 411, 456, 814 P.2d 1273, 1299 (1991) 17

Pulley v. Harris,
465 U.S. 37, 42-43, 104 S.Ct. 871, 875-876 (1984) 8

State v. Cherry,
298 N.C. 86, 257 S.E. 2d 551
(N.C. 1979) 11, 12, 15, 18

State v. McDougall,
308 N.C. 1, 301 S.E. 2d 308 (N.C. 1983) 14, 15

State v. Middlebrooks,
840 S.W. 2d 317 (Tenn. 1992) v, vi, 2-6, 8-12,
15-19, 21-28

Sumner v. Shuman,
483 U.S. 66, 85, 107 S.Ct. 2716 (1989) 13

Tison v. Arizona,
481 U.S. 137, 107 S.Ct. 1676 (1987) v, 2, 7,
21-24, 26, 27

Woodson v. North Carolina,
428 U.S. 280, 304, 96 S.Ct. 2978,
291 (1976) 11, 28

Zant v. Stephens,
462 U.S. 862, 103 S.Ct. 2733 (1983) 8-11, 19, 24

SUMMARY OF THE ARGUMENT

It is appropriate for the sentencer in a capital case to consider as an aggravating circumstance the fact that the murder occurred in the course of a felony murder even though felony murder is the factor which made the defendant death eligible.

In reaching the opposite conclusion, the majority opinion in Part III of *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), utilizes a formalistic, mechanical approach to the decision as to who receives the death penalty. However, the Eighth Amendment of the Constitution of the United States requires that a totality of the circumstances approach be used. The mechanical approach results in undue hostility to the felony murder rule and, in essence, forecloses the jury from considering the circumstances of the crime in all cases where a felony murder makes the defendant death eligible.

The mechanical approach, combined with the Tennessee Supreme Court's misunderstanding of the effect of the decisions of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), adds an unnecessary, unwise, and unrequired additional step to appropriate Eighth Amendment analysis. The decisions in *Enmund v. Florida* and *Tison v. Arizona* have had the effect of narrowing the felony murder class sufficiently to satisfy the Eighth Amendment.

The sentence of death and the procedure by which it was chosen in this case met all the requirements of the Eighth Amendment and this Court's precedents. Therefore, the decision of the Supreme Court of Tennessee declaring that sentence to be void under the Eighth Amendment should be reversed.

No. 92-989

IN THE
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STATE OF TENNESSEE,
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ON WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF TENNESSEE AND BRIEF OF *AMICUS CURIAE*

Pursuant to Rule 37.4, Rules of the Supreme Court of the United States, *amicus curiae*, the Appellate Committee of the California District Attorney's Association, including the District Attorney of Los Angeles County, hereby moves for leave of this Court to file the attached *amicus curiae* brief in support of the State of Tennessee.

Amicus sought on three separate occasions to make contact with counsel for petitioner in this case for the purpose of obtaining consent pursuant to Rule 37.3, Rules of the Supreme Court of the United States. Counsel for petitioner has failed to respond to these inquiries. Similar efforts to contact respondent's counsel have led to similar results.

The California District Attorney's Association is an association of District Attorneys (and their deputies) who are authorized law officers of the State of California and of the counties they represent, including the County of Los Angeles, such counties being political subdivisions of the state. Thus, had the members of this association individually and separately sought to file this brief, consent would not have been required. See Rule 37.5, Rules of the Supreme Court of the United States.

In the event that this Court is not inclined to grant leave to file this brief on behalf of the Association, *amicus* respectfully requests that it be filed on behalf of the District Attorney of Los Angeles County alone under Rule 37.5.

Amicus believes that pursuant to Rule 37.1, Rules of the Supreme Court of the United States, the *amicus* brief offered herein brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties and will be of considerable help to the Court. The basic premise of petitioner's position in this matter, as revealed by its argument in the Petition for Writ of Certiorari, is that the holding in Part III of the Tennessee Supreme Court's opinion in *State v. Middlebrooks*, 840 S.W. 2d 317 (Tenn. 1992), conflicts with specific interpretations of the Eighth Amendment of the United States Constitution by this Court. Thus, petitioner argues that the interpretation of "narrowing" found in the opinion is not found in any opinion of this Court, relies in part on a misinterpretation of *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), and *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988), and other decisions of this Court, and ignores additional statutory safeguards in the Tennessee death penalty

system. While *Amicus* agrees that the majority in Part III of the *Middlebrooks* opinion misinterprets the specific holdings of numerous precedents of this Court, *Amicus* argues that these misinterpretations are the result of a larger misunderstanding by the Tennessee majority in Part III of *Middlebrooks* as to the proper approach to making the death determinations under the Eighth Amendment of the United States Constitution. This misunderstanding attempts to substitute a formalistic, mechanical approach to the decision as to who receives the death penalty for the appropriate approach which requires a more inclusive weighing of the totality of the circumstances. This mechanical approach results in undue hostility to the felony murder rule and leads to the exclusion of a consideration of the underlying circumstances of the crime in those situations where felony murder is the basis for death eligibility. Thus, the *Amicus* position brings relevant arguments to the attention of this Court that would not otherwise be discussed. Hence, it is submitted that the brief of *Amicus* will be helpful to this Court.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter - which raises the issue of the use of felony murder as an aggravating circumstance by the sentencer in capital proceedings - the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case

shall likely have substantial impact upon the administration of criminal justice throughout California. The California Supreme Court in a number of decisions has rejected the position the *Middlebrooks* majority adopts in Part III of their opinion, i.e., that the same felony murder aggravating circumstance cannot be used to both (1) narrow the class of murderers (by a first degree murder verdict with a special circumstance finding in California) and (2) support the choice to impose the death penalty rather than the alternative of imprisonment. It is for this reason that the Committee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted,
on behalf of the

California District Attorneys Association, and the District Attorney of Los Angeles County

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I

THE HOLDING OF *STATE* v. *MIDDLEBROOKS*, 840 S.W. 2d 317 (TENN. 1992), IS BASED ON AN INAPPROPRIATE APPROACH TO THE ISSUE OF WHO RECEIVES THE PENALTY OF DEATH

A. The proper role of aggravating circumstances in death penalty jurisprudence

The issue presented by the instant case can only be properly understood by being put in the context of what an aggravating circumstance is constitutionally required to accomplish in a death penalty scheme. This Court has been particularly clear in a number of decisions as to what is and what is not required for an aggravating circumstance to meet the requirements of the Eighth Amendment. For example, the unanimous opinion in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988), in discussing an attack on a particular aggravating circumstance as vague, stated:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman.

Id., at 486 U.S. 361-362.

The same point is emphasized a little later in that same opinion:

> Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Id., at 486 U.S. 362.

As *Maynard* points out, the same point had been made in the earlier case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980). In holding an aggravating circumstance that a murder was "outrageously or wantonly vile, horrible and inhuman" too vague to serve its constitutional role, this Court in *Godfrey* reasoned:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed.

Id., at 446 U.S. 428-429.

Thus, this Court concluded in *Godfrey* that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*, at 446 U.S. 433.

Felony murder, with the elements of the underlying felony commonly spelled out in penal codes and jury instructions, is clearly not vague as an aggravating circumstance and thus does satisfy its role as a guide to the jury. This is obviously not what was of concern to the Tennessee Supreme Court in *State v. Middlebrooks*, 840 S.W. 2d 317 (Tenn. 1992). The question

then becomes why the Tennessee Supreme Court concludes the aggravating circumstance of felony murder was inadequate constitutionally. That court has phrased its concern in terms of narrowing, but it is clear that a felony murder special circumstance does "distinguish" (i.e., narrow), at least quantitatively, the class of murders in which the death penalty may be imposed from the cases in which it may not within the meaning of the above decisions. The nine crimes (or attempts to commit those crimes) which formed the basis of the felony murder aggravating circumstance in Tennessee clearly could not cover the majority of murders which occur in that state or any state. For purposes of imposing the death penalty, this class is further reduced to those first degree felony murderers who were major participants in the felony and showed a reckless indifference to human life, these being requirements which must be met under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), properly understood (see Section II *post.*).

B. Confusion of narrowing with proportionality[1] in *State v Middlebrooks*

It appears the real problem the majority of the Tennessee Supreme Court has with the death penalty system developed by the Tennessee legislature is not so much that it fails to satisfactorily limit the number of death eligible murderers but rather with who is included and who is excluded from the death eligible class. In other words, the *Middlebrooks* majority would exclude felony murderers unless there is an additional aggravating circumstance which would justify the death penalty in the sentencing phase. The decisions of this Court have clearly never so held, but the Tennessee Supreme Court nevertheless substantially relies on this Court's decisions, primarily *Zant* v. *Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983), to do so. *Zant* is cited for the following propositions:

> A state, however, must not only genuinely narrow the class of death eligible defendants, but must do so in a way that reasonably justifies the

1. "Proportionality" is being used in the traditional sense of an abstract evaluation of the appropriateness of a sentence for a particular crime, judging the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes. This is distinct from "proportionality" as a comparison of the gravity of a murder in which a death penalty is imposed in a particular case with the gravity of offenses in similar cases. *Pulley v. Harris*, 465 U.S. 37, 42-43, 104 S.Ct. 871, 875-876 (1984), both makes this distinction and holds that the latter type of review is not invariably necessary to uphold a state death penalty system.

> imposition of a more severe sentence on the defendant compared to others found guilty of murder. . . . A proper narrowing device. . . must differentiate a death penalty case in an objective, evenhanded, and substantially rational way from the murder cases in which the death penalty may not be imposed.

State v. *Middlebrooks*, 849 S.W.2d 317, 343 (Tenn. 1992).

Yet, the *Zant* opinion only made these points in connection with the issue of vagueness. The actual quote from *Zant* which *Middlebrooks* paraphrases above begins with the phrase "[t]o avoid this constitutional flaw" and refers to the previous sentence where the flaw being discussed is the vagueness of standards. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The court then proceeded to discuss *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980), and its striking down of an aggravating circumstance that was so vague that it could be interpreted to include all murders. As discussed, *ante*, vagueness is not even arguably a problem with felony murder as a special circumstance.

Zant actually stands for the opposite of that for which the *Middlebrooks* majority attempts to use it in that *Zant* stresses that the circumstances of the crime *should be* considered in the sentencing phase and that narrowing is *not* the purpose at the sentencing phase. *Zant's* discussion of the constitutionality of the Georgia death penalty made a clear distinction between (1) the "aggravating circumstance" which narrowed the class of death eligible murderers and (2) the aggravating and mitigating circumstances which were to be weighed by the trier of fact to decide if death was the appropriate sentence for the particular death eligible defendant before the court. In making this distinction, the Court stated:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting from among that class, those defendants who will actually be sentenced to death.
>
> What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Id., at 462 U.S. 878-879.

As to this second stage, the *Zant* opinion also characterizes its earlier decision in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2906 (1976), as approving "Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." *Id.*, at 462 U.S. 875.

Thus, after the class of murderers has been narrowed by the finding of at least one aggravating circumstance, it is clear that the function of aggravating circumstances is not to further narrow the class but rather to decide if the specific defendant before the court should receive the death penalty for which he has been determined eligible or whether he should be shown mercy due to the weighing of the aggravating and mitigating circumstances. Yet, the *Middlebrooks* majority confuses the purposes of the two stages and is analyzing the felony murder aggravating circumstance as a narrowing device where that aggravating circumstance would properly be used as part of the

individualized determination as to the culpability of the defendant. In essence, the *Middlebrooks* majority is saying that the circumstances of the crime itself cannot be considered in determining whether the individual defendant should receive the death penalty or not, which is preposterous. It is exactly the circumstances of the crime (combined with the character of the individual) that this Court has said repeatedly must be considered by the trier of fact in this stage of the proceedings. In addition to *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983), see *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976), *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-877 (1982).

Yet, by excluding the fact of felony murder as an aggravating factor, the *Middlebrooks* majority is excluding consideration of the circumstances of the crime, or at least excluding it as an aggravating factor, thus distorting the entire purpose of the sentencing hearing. Thus, the majority in *Middlebrooks* is in fact saying that the death penalty for a felony murder is *disproportionate*. Justice Drowota's concurring and dissenting opinion in *Middlebrooks* also interprets the majority opinion as being essentially based upon proportionality analysis by noting the citation by the majority to *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (N.C. 1979). However, as discussed in the next section, the reasoning in the *Cherry* opinion is not consistent with this Court's opinions as to the proper approach to death penalty jurisprudence.

C. *State* v. *Middlebrooks* uses an improper mechanical approach to assess the role of aggravating circumstances in the sentencing decision

One additional source of authority is offered by the *Middlebrooks* opinion for the position that a felony murder aggravated circumstance cannot be used in Tennessee as a circumstance in support of the imposition of the death penalty. This authority is the North Carolina Supreme Court case of *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (N.C. 1979), which the majority opinion at one point quotes at length. The beginning of that quotation is particularly telling as to the thinking both of the North Carolina Supreme Court and the Tennessee Supreme Court:

> . . . A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" [in the sentencing hearing] for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him.

State v. Cherry, 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979), quoted in *State v. Middlebrooks* 840 S.W.2d 317, 342. This quotation and the language that follows it show some confusion (by both state Supreme Courts) as to the nature of the constitutionally required determination between death and imprisonment. This approach of judging which sentencing decision is appropriate by counting how many "strikes" different situations would involve misses the point underlying the individualized sentencing required by this Court's decisions and "the fundamental respect for humanity underlying the Eight Amend-

ment." *Sumner v. Shuman*, 483 U.S. 66, 85, 107 S.Ct. 2716 (1989). As the California Supreme Court has stated in interpreting a death penalty statute then before it: "Nor would a statute pass muster if it required jurors to render a death verdict on the basis of some arithmetical formula, or if it forced them to impose death on any basis other than their own judgment that such a verdict was appropriate under all the facts and circumstances of the individual case." *People* v. *Brown*, 40 Cal.3d 512, 540, 709 P.2d 440, 455-456 (1985) (Footnote omitted), reversed on other grounds in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837 (1987). As the California Supreme Court went on to state:

> [W]ith respect to the process of selecting from among that class those defendants who will actually be sentenced to death, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." (Citation omitted.) It is not simply a finding of facts which resolves the penalty decision, "'but . . . the jury's moral assessment of those facts as they reflect on whether defendant should be put to death . . . .'" (Citation omitted.) The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty. (Fn. omitted.) Moreover, the decision is the responsibility of the jury and no one else. "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determin-

> ing the appropriateness of the defendant's death rests elsewhere." (Citation omitted.)

Id., at 40 Cal.3d 540, 709 P.2d 455.

The California Supreme Court in *People* v. *Brown*, 40 Cal.3d 512, fn.11, 709 P.2d 440 (1985), reversed on other grounds in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837 (1987), reached these conclusions after analyzing a number of decisions, including reasoning it found implicit in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), and the concurring opinion of Justice Stevens in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418 (1983). In *Barclay*, Justice Stevens quoted approvingly the Florida Supreme Court's statement that "'. . . [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . .'" (*Barclay*, 463 U.S. at p. 963). The California Supreme Court also cited several state court opinions, including a decision from the North Carolina Supreme Court, *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (N.C. 1983). In that case, the North Carolina Supreme Court stated that a sentencing jury in a death penalty case:

> must be satisfied that the sentence is justified and appropriate upon considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. . . .
>
> The jury is not required to assign a value to the aggravating circumstances, subtract from it the value of the mitigating circumstances, and look to the remainder to determine if that value is

> sufficiently substantial to deserve the death penalty. We reject and disapprove such a mechanical mathematical approach to the decision of life or death.

State v. McDougall, 308 N.C. 1, 32, 301 S.E.2d 308, 326, quoted in *People* v. *Brown*, 40 Cal.3d 512, 543 fn.14, 709 P.2d 440, 458 (1985), reversed on other grounds in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837 (1987).

Thus, the Tennessee Supreme Court, in relying on *Cherry's* mechanical approach and in choosing to not allow the felony murder to be considered as an aggravating circumstance in the sentence choice, is on shaky ground. Such a decision is clearly contrary to the better reasoned evaluations of the purpose of the sentencing hearing cited above.

Such an approach is also clearly not mandated by this Court and, because *Middlebrooks* states that the Eight Amendment demands such a rule, the conclusion in Part III of *Middlebrooks* is wrong and must be reversed. This very issue was presented in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988), where multiple homicides formed the basis of the first degree murder finding, making the death penalty an option as the appropriate sentence (i.e., narrowing the class of murderers) and also the basis of the sole finding of the sentencing hearing to survive the appellate process justifying a sentence of death rather then the alternative prison sentence. *Id.*, at 484 U.S. 243. This Court first dealt with the petitioner's attack on the "double use" of this factor and argument that his death sentence must be set aside by pointing out that this argument relied on "a mistaken premise as to the necessary role of aggravating circumstances." *Id.* at 484 U.S. 244. Later in the opinion, this Court clearly spelled out what this mistaken premise was:

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." **The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.** There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Id., 484 U.S. 246.

The Part III majority of *Middlebrooks* attempts to distinguish *Lowenfield* because of a difference in the sentencing structure between the Louisiana death penalty system and that of Tennessee. However, the distinction *Middlebrooks* draws makes no difference to the application of *Lowenfield* to the issue before it. *Middlebrooks* points out that the Louisiana statute narrowed the class of murderers by narrowly defining first degree murder and Tennessee does not. *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992). The real point, however, is that the class of murderers is narrowed in Tennessee by a jury finding of an aggravating circumstance. In both states, the issue then becomes can the jury use the same

factor to choose a death sentence. The fact that the class was narrowed in different ways does not effect this issue, and *Lowenfield* would apply in both situations.

The Supreme Court of California has cited *Lowenfield* for the proposition that "the 'triple use' of the same facts did not offend the cruel and unusual punishments clause." *People v. Marshall*, 50 Cal.3d 907, 945, 790 P.2d 676, 696-697 (1990). The explanation of what the California Supreme Court meant by "triple use" is contained in the following language:

> Defendant next claims the law is violative of principles established in the double jeopardy clause of the Fifth Amendment, the cruel and unusual punishments clause of the Eighth Amendment, and the due process clause of the Fourteenth Amendment because it allows the "triple use" of the same facts--i.e., to support (1) the conviction of first degree murder on a theory of felony murder, (2) the finding of the felony-murder special circumstance, and (3) the imposition of the penalty of death. But as defendant himself recognizes, the underpinnings of his argument have been removed by such decisions as *People* v. *Gates* (1987) 43 Cal.3d 1168, 1188, 240 Cal.Rptr. 666, 743 P.2d 301, and *People* v. *Anderson*, *supra*, 43 Cal.3d at page 1147, 240 Cal.Rptr. 585, 742 P.2d 1306.

Id., at 50 Cal.3d 945-946, see also *People v. Webster*, 54 Cal.3d 411, 456, 814 P.2d 1273, 1299 (1991).

Thus, California in a number of decisions has rejected the position the *Middlebrooks* majority in Part III adopts, i.e., that the same felony murder aggravating circumstance cannot be used both to narrow the class of murderers (the first degree

murder verdict with a special circumstance finding in California) and to support the choice to impose the death penalty rather than the alternative of imprisonment. In doing so, the California Supreme Court relied on *Lowenfield*, interpreting it as argued here since the California death penalty system is much more similar to the system of Tennessee than that of Louisiana.

D. Felony murder is a proper aggravating circumstance

Despite its contentions to the contrary, the Tennessee Supreme Court in the majority opinion in Part III of *Middlebrooks* was judging the proportionality of the death penalty for felony murder and found the death penalty disproportionate. Its holding requires a jury to find a felony murder plus another aggravating circumstance. Although the majority purports to reach this result by narrowing analysis (see discussion in Section I B, *ante*), Justice Drowota's concurring and dissenting opinion is more accurate in describing the analysis of the majority as based on a concern for a perceived disproportionality in allowing capital punishment for felony murder. Justice Drowota reaches this conclusion in part from the majority's reliance on quoted language from *State v. Cherry*, 308 N.C. 1, 257 S.E. 2d 551 (N.C. 1979), which at one point explicitly adopts proportionality analysis. The following language from *Cherry* quoted in *Middlebrooks* reflects this analysis:

> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to the "automatic"

> aggravating circumstance dealing with the underlying felony.

State v. Cherry, 298 N.C. 86, 113, 257 S.E. 2d 551, 568 (1979), quoted in *State v. Middlebrooks* 840 S.W.2d 317, 342. Despite quoting this language, the *Middlebrooks* majority proceeds directly to an analysis of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983) as a narrowing case, returning eventually to proportionality analysis under the guise of narrowing "in a way that reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *State v. Middlebrooks*, 840 S.W.2d 317, 343. As discussed, *ante*, in Section I B of this brief, this analysis involves a misreading of *Zant*.

Since the underlying thrust of Part III of the majority opinion is thus a certain hostility to the felony murder doctrine in relation to the death penalty, it is important to note that this antagonism can not be said to be shared by the community as a whole. Although the felony murder rule both as a general doctrine and as a basis for capital punishment has been criticized by several academic commentators, neither the legislative branches of this nation nor the courts as a whole have shared this hostility. As David Crump and Susan Waite Crump in *In Defense of the Felony Murder Doctrine*, 8 HARV.J.L. & PUB.POL'Y 359 (1985), pointed out in discussing the "widespread acceptance" of the felony murder doctrine,

> Scholarly denunciation has had little effect upon its retention. Few legislatures have repealed the doctrine, and the courts, although correctly concerned about its proper limitation, have generally continued to enforce it.

Id. at 359-360 (footnotes omitted).

Ironically, Part II of the majority opinion of *Middlebrooks*, by the same author as Part III of *Middlebrooks* (but with a different majority from Part II), makes the same point. In its analysis of the enactments of state legislatures, including the modification of the death penalty system by the Tennessee General Assembly in 1989, as well as jury verdicts and court decisions, the majority opinion in Part II reaches the same conclusion as the authors of "In Defense of the Felony Murder Doctrine," also pointing out that thirty-two of the thirty-six states with the death penalty allow that punishment for felony murder.

Similar points are made in the opinions of the members of this Court. For example, Justice O'Connor in her dissent in *Enmund* concludes at one point that:

> In sum, the petitioner and the Court have failed to show that contemporary standards, as reflected in both jury determinations and legislative enactments, preclude imposition of the death penalty for accomplice felony murder.

Enmund v. Florida (1982) 458 U.S. 782, 826, 102 S.Ct 3368, 3391 (1982).

The rationale for the general acceptance of the doctrine of felony murder and its appropriateness as a basis for the death penalty is related by some of these same sources. For example, the article "In Defense of the Felony Murder Doctrine" suggests the discrepancy between scholarly criticisms and the general acceptance of the felony murder doctrine is due to the artificially logical or consistent theory holding mens rea to be the only legitimate determinant of the grade of a homicide, thereby neglecting the doctrine's relationship to proportionality and the results of the defendant's conduct. However, the general public is

> "particularly fearful of being victimized by strangers." BUREAU OF JUSTICE STATISTICS REPORT, *supra*, note 18, at 15 (reporting results of National Crime Survey). They "worry most about being injured by strangers." Furthermore, "[m]ost violent crimes except murder are committed by strangers" Id. These finding are consistent with the finding that certain ostensible felony murders were ranked as more serious than certain express-malice family killings. The conclusion follows from these data that the felony murder rule targets for severe treatment precisely those homicides that the population regards as most serious--a result in keeping with the principle of proportionality.

Crump & Crump, 8 HARV.J.L. & PUB.POL'Y 359 at 366-367, footnote 31, (1985)

Similarly, Justice O'Connor in a portion of her majority opinion in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), quoted by the majority in Part II of *State v. Middlebrooks*, identifies the following rationale for treating certain felony murders more seriously than certain premeditated murder:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all -- the person who tortures another, not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human

> life may be every bit as shocking to the moral sense as an intent to kill.

Tison v. Arizona, 481 U.S. 137, 157, quoted by *State v. Middlebrooks*, 840 S.W. 2d 317, 339 (emphasis omitted).

Earlier in *Tison* the Court had pointed out that:

> Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; . . . .

Tison v. Arizona, 481 U.S. 137, 140.

Based in part on this reasoning, this Court has in fact in *Tison*, answered the proportionality issue with which the Part III majority of *Middlebrooks* is struggling. This answer, however, is the very opposite of what Part III of *Middlebrooks* holds, as will be discussed in the next sections.

II

THE OPINION IN *STATE v. MIDDLEBROOKS*, 840 S.W.2d 317 (TENN. 1992), DUE TO ITS MISUNDERSTANDING AND MISAPPLICATION OF *ENMUND v. FLORIDA*, 458 U.S. 782, 102 S.Ct. 3368 (1982) AND *TISON v. ARIZONA*, 481 U.S. 137, 107 S.Ct. 1676 (1987), CREATES AN UNNECESSARY AND UNWISE EXTRA STEP TO THE DEATH PENALTY PROCESS

A. The Holdings of *Enmund v. Florida* and *Tison v. Arizona* and their effect on narrowing

If one agrees with this Brief's above analysis of the decision in *State v. Middlebrooks*, this Court in *Tison* has already dealt with the essence of the real question at issue in

the instant case and reached the opposite conclusion from the Tennessee Supreme Court. The question presented in *Tison* was whether the participation by the defendants in events leading up to the murder of four members of a family was sufficient to make the death penalty constitutionally permissible "although neither petitioner specifically intended to kill the victims and neither inflicted the fatal gunshot wounds." *Tison v. Arizona*, 451 U.S. 137, 138. *Tison*, of course, followed this Court's decision in *Enmund*. *Tison* characterized *Enmund* as holding defendant Enmund's death sentence disproportional under the Eighth Amendment because Enmund was a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state." Id. at 481 U.S. 149. However, *Tison* also characterized *Enmund* as clearly holding that jurisdictions that limited the death penalty to situations where the felony murderer actually killed, attempted to kill, or intended to kill could continue to exact the death penalty where the circumstances warranted it. *Id.*, at 150.

In light of its analysis of *Enmund*, the *Tison* opinion restates the issue as "whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." *Id.*, at 481 U.S. 152. This question the majority opinion answers in the affirmative.

B. The opinion in *State v. Middlebrooks* misapplies *Tison v. Arizona* and *Enmund v. Florida*

The Tennessee Supreme Court characterized the effect of *Tison* as follows:

> Furthermore, the Supreme Court case of *Tison v. Arizona* now places a nationwide

> threshold of culpability at the reckless indifference level, meaning that a defendant who acts without reckless indifference is not constitutionally eligible for the death penalty. Therefore, since the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants.

State v. Middlebrooks, 840 S.W.2d 317, 345 (Tenn. 1992); citations omitted.

The mistake of the Tennessee Supreme Court is to posit a necessity under the Eighth Amendment to "further narrow" the class of death-eligible defendants. The requirement under this Court's decisions is that the class of murderers as a whole must be narrowed. Thus, in *Zant v. Stephens*, 462 U.S. 862, 879 this Court stated: "These two findings [of aggravating circumstances] adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed."

The analysis by the Tennessee Supreme Court quoted above would only be correct if the class created by the application of *Enmund* and *Tison* to felony murderers was too large a class. This Court has never so held. The fact is that *Tison* sufficiently narrows the class of all murder cases by its requirements of "major participation in the felony committed, combined with reckless indifference to human life." Although *Tison* was concerned directly only with proportionality, this narrowing aspect of the decision cannot be overlooked. The Tennessee Supreme Court in *Middlebrooks*, however, does overlook this aspect and instead incorrectly adds a requirement of further narrowing.

C. The importance of the difference for death penalty jurisprudence

Thus, *State* v. *Middlebrooks* adds an unnecessary step to the required Eighth Amendment mandates as expressed in this Court's death penalty jurisprudence and believes it is required to do so by those very same precedents from this Court. As discussed in Part I, *ante*, this extra step unwisely forecloses the jury from considering the circumstances of the crime in a significant number of cases, i.e., all those where felony murder is the basis for the defendant being eligible for the death penalty.

III

APPLICATION OF THE CORRECT AND APPROPRIATE CONSTITUTIONAL PRINCIPLES TO THE FACTS OF *STATE v. MIDDLEBROOKS* REQUIRES REVERSAL OF THE HOLDING OF *STATE v. MIDDLEBROOKS*, 840 S.W. 2d 317 (Tenn. 1992)

A. Defendant Middlebrooks was sufficiently involved in the underlying felony

Applying the correct Constitutional principles to the facts of *State v. Middlebrooks*, it is clear that the death penalty was appropriately chosen as the appropriate sentence for defendant Middlebrooks. The first question to be analyzed under the correct principles is defendant Middlebrooks' involvement in the crime leading to the death of the victim.

The facts, as related in the majority opinion of *Middlebrooks*, show that the involvement of defendant Middlebrooks in the underlying felony, kidnapping, was major.

Witnesses saw Middlebrooks and his co-defendant, Brewington, chase the victim and his friends until they caught the victim. While Brewington held the victim around his neck and head, Middlebrooks held the victim's hand. Both defendants dragged the victim to another location, at which time Middlebrooks struck the victim in the face, knocking him to the ground. In Middlebrooks' video-taped statement, he admitted only minor participation in the later beating and tortuous mistreatment of the victim and instead depicted Brewington as the main perpetrator of the offense. He stated that the abuse of the victim was done by Brewington, himself and his wife while all were present, but admitted only striking the victim with his open hand and on the leg with a switch during the torture other than stabbing the victim once after Brewington had stabbed him. Middlebrooks, however, had made a previous statement in which he had admitted stabbing the victim twice. (*State v. Middlebrooks*, 840 S.W.2d 317, 324.)

The jury convicted Middlebrooks of first-degree murder in the perpetration of a felony and of aggravated kidnapping. The sentencing phase included the incorporation of the guilt-phase evidence; the jury found the existence of the two aggravating circumstances, basically torture and that the murder was committed while the defendant was engaged in committing a felony, and sentenced the defendant to death. (*Id.*, at 840 S.W.2d 325-326.)

As in *Tison*, defendant Middlebrooks' "participation in the crime was anything but minor" in that he fully participated in the felony, placed the victim in a position to be killed, and watched the killing. *Tison v. Arizona*, 481 U.S. 137, 152-153. Actually, Middlebrooks' participation in the instant killing was greater than that of the defendants in *Tison* in that Middlebrooks actually stabbed the victim whereas in *Tison* the

defendants had not delivered any direct injury to the victim. *Tison v. Arizona*, 481 U.S. 137, 141. It also appears from the recitation of facts in *Middlebrooks* that Middlebrooks very well could have delivered the fatal stab wound, either under his second statement that he inflicted only one of the stab wounds or his earlier statement that he had inflicted both of them. *State v. Middlebrooks*, 840 S.W.2d 317, 324.

B. Defendant Middlebrooks had the required state of mind towards human life

The second question that must be answered to support the death penalty in this case is the state of mind of Middlebrooks in relation to the death of the victim.

The jury acquitted the defendant of premeditated first-degree murder. Nevertheless, Middlebrooks, in his second statement, gave as his reasons for stabbing the victim "'to prove to Roger that I guess I was cooler' and to put Majors out of his misery." The expert testimony showed that the victim's ordeal lasted several hours, that various acts of torture had occurred during that time, and that there were two deep stab wounds, one of which caused the victim to bleed to death over a period of ten to thirty minutes, during part of which the victim was conscious. *Id.*, at 840 S.W.2d 317, 324-325.

This evidence in the context of the complete facts of the case as spelled out in the majority opinion of *Middlebrooks* clearly supports, as in *Tison*, the view that Middlebrooks "subjectively appreciated that [his] acts were likely to result in the taking of innocent life." *Tison v. Arizona*, 481 U.S. 137, 152.

C. The jury in this case had opportunity to show mercy

The third and final question that must be answered to uphold the death penalty in this case is whether the defendant had the opportunity to present to the sentencing jury all mitigating circumstances. See *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976), *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-877 (1982). The defendant did in fact present mitigating evidence at the sentencing hearing and the jury found that the aggravating circumstances outweighed the mitigating circumstances and sentenced the defendant to death. *State v. Middlebrooks*, 840 S.W.2d 317, 325-326. There is apparently no contention that he did not have a complete opportunity to present all mitigating evidence or that it was limited in any fashion. Instead, as argued above, the Tennessee Supreme Court mistakenly directed its attention to a non-existent requirement regarding aggravating circumstances. The Eighth Amendment of the United States Constitution does not require more of an aggravating circumstance than that it properly narrow the class of murderers to those for whom the death penalty is appropriate. The holding of the Tennessee Supreme Court to the contrary must therefore be reversed.

CONCLUSION

In conclusion, and for the reasons set forth above, this Court should reverse the ruling of the Tennessee Supreme Court and should hold that the sentence to death of the defendant is not precluded by the Eighth Amendment to the United States Constitution.

Respectfully submitted on behalf of the
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By

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NO. 92-989

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF TENNESSEE,
Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,
Respondent.

ON WRIT OF CERTIORARI

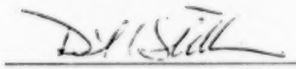
TO THE SUPREME COURT OF TENNESSEE

MOTION UNDER RULE 25.5

FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND APPENDIX

Pursuant to Rule 25.5 of the *Rules of the Supreme Court of the United States*, Respondent respectfully moves for leave to file the attached Supplemental Brief and Appendix for the purpose of bringing to the Court's attention the intervening decision reproduced in the Appendix. The relevance of this intervening decision is described in the body of the Supplemental Brief.

Respectfully submitted,



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As of November 10, 1993, there can no longer be any dispute that the Tennessee Supreme Court's judgment in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992) is based upon the alternative, adequate and independent state ground of Article I § 16 of the Tennessee Constitution. Therefore, this Court is constitutionally compelled to dismiss the petition for writ of certiorari.

In *State of Tennessee v. Michael Wayne Howell*, ___ S.W.2d ___ (Tenn. Nov. 10, 1993) (opinion attached as Appendix A), the Tennessee Supreme Court has stated unequivocally that *State v. Middlebrooks* rests upon Article I § 16 of the Tennessee Constitution as a separate, alternative, adequate and independent state ground for the judgment in this matter, and that the Tennessee Supreme Court's analysis of Article I § 16 was not compelled by its understanding of federal law.

> The decision in Middlebrooks was required by Art. I, § 16 of the Tennessee Constitution. We reviewed federal constitutional law in our analysis to determine whether the duplication also violated the Eighth Amendment to the United States Constitution, but Middlebrooks was decided on separate and independent state constitutional grounds. See *Middlebrooks*, 840 S.W.2d at 346; Zant v. Stephens, 462 U.S. at 877, 103 S.Ct. 2742.

State v. Howell, slip op. at 46 n. 7. (See, Appendix A at p. 46)

Thus, the Tennessee Supreme Court has once again clearly stated its judgment in *State v. Middlebrooks* rests upon the separate, alternative, adequate and independent state ground of Article I § 16 of the Tennessee Constitution, and this Court lacks jurisdiction to review that judgment. That judgment will remain the same under Article I § 16 of the Tennessee Constitution, regardless of whether this Court finds that the Tennessee sentencing scheme alternatively violates the Eighth Amendment.

This Court lacks jurisdiction to review the judgment.

Respectfully Submitted,

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APPENDIX A

FILED

NOV 10 1993

APPELLATE COURT CLERK
JACKSON

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE, Appellee, VS. MICHAEL WAYNE HOWELL, Appellant.	FOR PUBLICATION Filed: November 10, 1993 SHELBY CRIMINAL HON. JOSEPH B. McCARTIE, JUDGE S/C No. 1

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O P I N I O N

CONVICTION AND SENTENCE
AFFIRMED.

ANDERSON, J.

In this capital case, the defendant, Michael Wayne Howell, was found guilty of grand larceny and the first-degree felony murder of Alvin Kennedy, but found not guilty of premeditated first-degree murder.[1] In the sentencing hearing, the Memphis jury found two aggravating circumstances: (1) that the defendant was previously convicted of one or more felonies which involved the use or threat of violence to the person; and (2) that the murder was committed while the defendant was engaged in committing a felony. Tenn. Code Ann. § 39-2-203(i)(2) and (7)(1982). The jury rejected the aggravating circumstance that the murder was committed to prevent the lawful arrest or prosecution of the defendant, Tenn. Code Ann. § 39-2-203(i)(6)(1982), but found that there were no mitigating circumstances sufficiently substantial to outweigh the other two aggravating circumstances, and sentenced the defendant to death by electrocution. The court ordered the defendant's death sentence to run consecutively with a death sentence for murder in Oklahoma and a 25-year sentence for attempted murder in Florida, which convictions arose out of events that occurred shortly after the Memphis murder.

On appeal, the defendant raises numerous issues for our review, involving alleged errors occurring at trial in the guilt phase. We have carefully considered the defendant's contentions and have decided that none has merit. We, therefore, affirm the defendant's conviction in the guilt phase.

[1] Howell's co-defendant Watson was convicted of first-degree felony murder and was sentenced by the jury to life imprisonment. The Court of Criminal Appeals affirmed her conviction, and this Court denied her application to appeal.

In State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), a majority of this Court concluded that application of the aggravating circumstance set forth in Tenn. Code Ann. § 39-2-203(i)(7), that the murder occurred while the defendant was engaged in committing a felony, does not narrow the population of death-eligible felony murder defendants as required under the Tennessee and United States Constitutions, because it essentially duplicates the elements of the offense of first-degree felony murder. Applying the Middlebrooks holding to this case results in the invalidation of the felony murder aggravating circumstance and requires a determination of whether the jury's consideration of that aggravating circumstance was harmless beyond a reasonable doubt. Upon careful review of the record, we conclude that the submission of the felony murder aggravating circumstance for jury consideration, in this case, is harmless error beyond a reasonable doubt.

We, therefore, affirm the defendant's death sentence.

FACTUAL BACKGROUND

On Saturday, October 31, 1987, between 10:00 a.m. and 1:00 p.m., the defendant and his girlfriend, Mona Lisa

Watson, walked to the house of his brother's girlfriend, Cheri Goff. After arriving, the defendant showed Goff a set of keys to the Lynn Whitsett Corporation property in Memphis where he had previously worked, and announced that "he was going to go get him a truck." The defendant also said "he was going down hard this time, and he was going to take some people with him." After making these statements, Goff said the defendant used her telephone to call someone about getting a gun for him. Goff also testified that she had previously seen the defendant carrying a silver handgun with a white, or bone, handle.

Later that same night, sometime after 8:00 p.m., Terry Lee Ellis drove Howell and Watson to Raines Road and left them at the Ryder Truck Terminal near the Lynn Whitsett property. Earlier, around 7:30 p.m., the defendant and Watson had stopped by the home of Robert Brink, the husband of one of Watson's friends. Brink said Howell asked to borrow some money and used the telephone, but did not stay long.

Around 2:30 a.m. on Sunday, November 1, 1987, the defendant and Watson purchased a candy bar at the Quick-Shop Food Store on Macon in Memphis. Cassandra Henderson, the clerk on duty testified that the defendant was driving a white pickup truck with writing on the door and a workman's rack on the back, which he had parked on the blind side of

the store. Henderson also said that as Howell was leaving the store, he bumped into another customer, Rodney Graves, who was entering the store, and a fight broke out between the two men. After the fight, Henderson said she saw the defendant in the store parking lot with a silver pistol. Rodney Graves testified that after the fight, Howell went outside and returned to the front door of the store carrying a silver gun with bone handle, but nothing happened and the defendant left the premises.

Later that day, sometime in the evening of November 1, 1987, the defendant and Watson drove the Whitsett truck to Stanley Johnson's house. Johnson testified that Howell was waving around a nickel-plated .38 caliber pistol with a bone handle, which the defendant referred to as "Jesus Christ." In addition, Johnson said Howell told him that "anybody messes with us, I'll introduce them to Jesus Christ." Thereafter, between 9:00 and 10:00 p.m., Cheri Goff said she was returning home from a movie with some friends when she saw the defendant driving a white truck with a Lynn Whitsett logo on the side and red sideboards on the back.

At 11:05 p.m. on November 1, 1987, Tennessee Highway Patrol Officer Aaron Chism said he stopped by Loeb's 7-Eleven Market on Whitten Road off Interstate 40 in Shelby County, and saw the victim, Alvin Kennedy, working at his job on the midnight shift. Between 12:20 and 12:40 a.m. that same night, Brian Moser said he came into the Loeb's store to purchase a six-pack of beer, but there was no clerk in the store. As a result, after waiting a few minutes, Moser said

he decided to go across the street to the Southland 7-Eleven and purchase his beer.

At 12:45 a.m., Charles Allen stopped at Loeb's 7-Eleven to purchase some gasoline. When he went to pay for his gas, Allen found Kennedy's body lying behind the counter in a pool of blood, the cash register drawer open, and all of the paper money missing. As a result, Allen said he ran across the street to the Southland 7-Eleven and asked the clerk to call the police.

Upon investigation, it was discovered that Kennedy had been shot once from close range in the upper right forehead. The wound had immediately rendered him unconscious, and he had died within a short time. It was also discovered that $111.16 was missing from the store. The tape from the cash register indicated that the last transaction had occurred at 12:24 a.m.

Susan Bauer, the clerk at the Southland 7-Eleven across the street from the Loeb's store, testified that she remembered Watson and the defendant purchasing beer and a candy bar at her store around 12:20 a.m., approximately 20 minutes before Allen came in asking her to call the police. She said she remembered when they came in because they parked the Whitsett truck on the blind side of the store, which she thought was suspicious for that time of night.

Later that day, Monday, November 2, 1987, at approximately 9:00 p.m., Charlene Calhoun was shot in the

parking lot of her apartment complex near Interstate 40 in Dell City, Oklahoma, and her 1987 Toyota Tercel was stolen. A witness who heard the shooting said he saw a man and a woman get into a light-colored Toyota hatchback and drive away after the shots were fired. The Lynn Whitsett truck was found only 125 feet from the scene of the shooting, with its interior on fire, and the defendant's left palm prints on the truck's fenders.

On the morning of Tuesday, November 3, 1987, Stanley Johnson said he saw Howell and Watson in Memphis, and they were driving a small compact car. The defendant asked Johnson for money and said that "he had a little heat on him [and] had to get out of town." Johnson said he gave Howell $20, and promised to try to raise a couple of hundred dollars more by that evening.

That night, the defendant and Watson came to Johnson's house. After Johnson told the defendant he had not been able to raise any money, Howell asked Johnson to sell his gun for him. When Johnson said he couldn't get $5 for the gun, the defendant decided to keep it. Johnson also told the defendant that the story of the killing was being broadcast, that his picture was being shown on TV, and it was reported that he killed a man for $17. Johnson testified that he asked the defendant "Why $17?," and Howell replied, "Yeah, he wouldn't open the safe, so I told him I'd introduce him to Jesus Christ if he wouldn't open the safe. You know how I am, Stan. If they're old enough to talk, I wasn't going to leave a witness. They're old enough to die." After

giving the defendant $30 and promising to try to find $200 for him by the next night, Johnson said Howell and Watson left, and he never saw them again.

Almost a month later, on November 29, 1987, the defendant and Watson were arrested in Panama City, Florida, after a shoot-out with police and a high-speed chase. They were driving the stolen Toyota from Oklahoma, but had replaced the Oklahoma tags with Tennessee plates from another vehicle. Florida police found a nickel-plated Smith & Wesson .38 revolver with a bone handle on the floorboard of the passenger's side where the defendant had been seated. Ballistics tests indicated that the bullet that had killed Alvin Kennedy had been fired from this gun, as had the bullet taken from the body of Charlene Calhoun in Oklahoma.

The last evidence introduced by the State was the redacted testimony of co-defendant Mona Lisa Watson given in April of 1988 at the defendant's Oklahoma preliminary hearing for the murder of Charlene Calhoun. Watson agreed to testify against the defendant in return for a life sentence. Although she later decided not to testify at both the Tennessee trial and the Oklahoma trial, Watson was questioned on direct examination by the prosecutors at the Oklahoma preliminary hearing. She testified that she and the defendant had driven Interstate 40 from Memphis to Oklahoma in the Lynn Whitsett truck on November 1 and 2, 1987. Watson said they drank beer and shot cocaine on the trip, and when they got to Dell City, Oklahoma, she said they got off the interstate and stopped at an apartment complex to walk around. After walking around

for a few minutes, Watson said Howell shot Charlene Calhoun, the two of them took her car, and they set fire to the Lynn Whitsett truck by igniting lighter fluid she had thrown on the front seat. Then, Watson said she and the defendant drove back to Memphis in Calhoun's car, and thereafter to Florida on November 3, 1987.

On cross-examination during the Oklahoma preliminary hearing, the Oklahoma public defender representing Howell asked Watson questions about a shooting in Memphis prior to their trip to Oklahoma. Watson testified that before going to Oklahoma, she and the defendant had gone into a convenience store in Memphis to purchase a six-pack of beer. After Howell handed her the beer and told her to go to the car, Watson said the defendant pulled a gun and shot the clerk in the head, and that it was the same gun Howell had shown her earlier.

Later, at the Tennessee trial, Howell's defense counsel tried to impeach the preliminary hearing testimony of Watson. He attempted to introduce testimony from Watson's Oklahoma lawyer and the defendant's Oklahoma lawyer that Watson later stated that she had lied during the preliminary hearing in order to escape the death penalty herself. The Memphis trial judge, however, sustained the State's objection that the evidence was hearsay and self-serving, and ruled the evidence inadmissible. Except for this attempt to impeach Watson's former testimony, the defendant presented no testimony on his behalf at the guilt phase of the trial.

Based upon this evidence, the jury found the defendant guilty of first-degree murder in the perpetration of a felony and grand larceny, but not guilty of premeditated first-degree murder.

In the sentencing phase, the state incorporated the evidence presented at the guilt phase, and introduced proof that the defendant had been convicted of armed robbery in Wyoming in 1980, of first-degree murder in Oklahoma in 1988, and of armed robbery and attempted first-degree murder in Florida in 1988.

In mitigation, the defendant's main theory was that he suffered from brain damage, and therefore his ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was impaired. The defendant's mother testified that Howell was a loving son who had come from a very poor family. She also testified that the defendant's father drank heavily, and the defendant grew up witnessing his father beating her. The defendant's mother testified that Howell, the fifth of nine children, had been born prematurely as a result of one such beating. After being diagnosed as a slow learner and being placed in special education classes, the defendant's mother said Howell finally dropped out of school in the eighth grade and went to work on his father's garbage truck.

The other evidence presented by the defendant's sister and mother demonstrated that he had suffered four head injuries during his life. Once, while working on the garbage

truck, the defendant was hit in the head by the truck compactor door and his skull was fractured. Another time, during a fight, one of his brothers hit him in the head and knocked him out with a bumper jack. The third injury occurred when a winch cable broke loose and knocked him unconscious while he was working on a river boat. The last injury occurred when he was knocked unconscious after taking several left hooks during a boxing match in the Wyoming prison.

The defendant's other witness, Dr. Phillip Murphy, a clinical psychologist, testified that he administered a battery of psychological tests to Howell in November of 1988. Dr. Murphy said that the test results showed "definite evidence of brain damage," and that the brain abnormalities impaired Howell's ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law to the extent that his judgment was substantially affected. Dr. Murphy diagnosed the defendant as suffering from chronic organic brain syndrome and a resultant personality disorder. Extensive medical testing, however, failed to show evidence of brain damage.

Based upon the proof, the jury found the existence of two aggravating circumstances beyond a reasonable doubt. The jury found that (1) the defendant was previously convicted of one or more felonies which involved the use or threat of violence to the person, Tenn. Code Ann. § 39-2-203(i)(2) (1982), and (2) that the murder was committed while the defendant was engaged in committing a felony, Tenn. Code Ann. § 39-2-203(i)(7)(1982). In addition, the jury found that

there were no mitigating circumstances sufficiently substantial to outweigh the two aggravating circumstances. As a result, the jury sentenced the defendant to death.

PART I.

GUILT PHASE - TRIAL ERRORS

A. Individual Jury Voir Dire

The first issue raised by the defendant is whether the trial court erred in refusing to allow individual voir dire on the prospective jurors' exposure to pretrial publicity. The defendant contends that many of the jurors had been exposed to pretrial publicity about this crime, the Oklahoma crime, and the Florida crime, and as a result, counsel for the defendant should have been allowed to engage in individual, sequestered voir dire of those prospective jurors. In particular, the defendant argues that his counsel should have been allowed to question jurors concerning the content of the pretrial publicity to which they were exposed.

The ultimate goal of voir dire is to see that jurors are competent, unbiased, and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court. State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992); State v. Simon, 635 S.W.2d 498, 508 (Tenn. 1982); see also Mu'Min v. Virginia, ___ U.S. ___, 111 S.Ct. 1899, 114 L.Ed.2d 293 (1991). Where the crime is highly publicized, the better procedure is to grant the defendants individual, sequestered,

voir dire, but it is only where there is a "significant possibility" that a juror has been exposed to potentially prejudicial material that individual voir dire is mandated. Harris, 839 S.W.2d at 65; State v. Porterfield, 746 S.W.2d 441, 447 (Tenn. 1988); and State v. Claybrook, 736 S.W.2d 95, 100 (Tenn. 1987). In addition, questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial, but such questions are not constitutionally compelled, and the trial court's failure to ask these questions is not reversible error unless it rendered the defendant's trial fundamentally unfair. Mu'Min v. Virginia, ___ U.S. at ___, 111 S.Ct. at 1905.

In this case, the record demonstrates that of the 78 prospective jurors examined, around 52, or about 64 percent, had some pretrial exposure to the case, either at the time the crime was committed, or shortly before the trial began. The trial court refused individual voir dire of all jurors who had heard or read something about the case but did not remember specific details, but the court indicated that individual voir dire would be permitted for those jurors who indicated that they did remember the specific content of news reports. However, none of the jurors who actually heard the case indicated that they remembered specific details of any of the pretrial publicity. In addition, those members of the jury who were exposed to pretrial publicity stated that they could and would render an impartial verdict based solely on the evidence presented at trial.

Based upon this record, we conclude that the trial court did not abuse its discretion in refusing to allow individual voir dire of prospective jurors with respect to the content of pretrial news reports to which they had been exposed. A trial court's findings of juror impartiality may be overturned only for "manifest error," Patton v. Yount, 467 U.S. 1025, 1031, 104 S.Ct. 2885, 2889, 81 L.Ed. 2d 847 (1984), and we find no such error on this record.

Next, the defendant contends that the trial court's failure to allow him to ask prospective jurors exactly what they knew about the case from the pretrial publicity impaired his right to use his peremptory challenges intelligently and violated his rights to due process, and his right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the U.S. Constitution.

It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury, see Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), and the use of peremptory challenges is a means to achieve the end of an impartial jury. Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988). However, although the right to exercise peremptory challenges is "one of the most important of the rights secured to the accused," Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965), the right to exercise peremptory challenges is not of constitutional dimension. Ross, 487 U.S. at 88, 108 S.Ct. at 2278.

As long as the jury that sits is impartial, the denial or impairment of the right to exercise peremptory challenges does not violate the Sixth Amendment. Id. In addition, because peremptory challenges are a creature of statute and are not required by the Constitution, denial or impairment of the right to exercise peremptory challenges does not violate the due process clause of the Fourteenth Amendment as long as the defendant receives what the state law provides. Id., 487 U.S. at 89, 108 S.Ct at 2279.

In this case, the defendant was permitted to exercise all 15 of the peremptory challenges a death-eligible defendant is allowed under Tenn. R. Crim. P. 24, and the record does not support a charge of systematic impairment of his ability to exercise those challenges. In addition, there is no evidence that the jury which ultimately heard the case was unfair or partial.

Accordingly, we find no reversible error as a result of the restriction of voir dire.

B. Jury Voir Dire and Challenges For Cause

The next issue we address is whether the trial court erred in failing to strike certain prospective jurors for cause because they admitted to having preconceived opinions about the case. The defendant argues that two jurors should have been excused for cause under Tenn. R. Crim. P. 24(b)(2), which provides, in part, that if a juror

"admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial."

A trial court has wide discretion in ruling on the qualifications of a juror, State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989), but irrespective of whether the trial judge should have excluded the two challenged jurors for cause, any error in this regard is harmless unless the jury who heard the case was not fair and impartial. State v. Thompson, 768 S.W.2d 239, 246 (Tenn. 1989). It is a long-settled principle that a defendant who disagrees with a trial court's ruling on for cause challenges must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise peremptory challenges to remove the jurors. Even then, however, the failure to correctly exclude a juror for cause is grounds for reversal only if the defendant exhausts all of his peremptory challenges and an incompetent juror is forced upon him. Ross, 487 U.S. at 89, 108 S.Ct. at 2279; and State v. Jones, 789 S.W.2d 545, 549 (Tenn. 1990).

The record reflects that one of the challenged jurors, Michael Benson, did not serve on the jury. Accordingly, any error in refusing to excuse him for cause in and of itself does not entitle the defendant to a new trial unless the jury that ultimately heard the case was not fair and impartial. State v. Thompson, 768 S.W.2d at 246.

The record also reflects, however, that the other challenged juror, Ricky Carver, did serve on the jury. On voir dire by the State, Carver stated that he had opinions but believed he could set aside any preconceived opinion and require the State to prove beyond a reasonable doubt that the defendant was guilty.

The trial judge excused other jurors for cause after they testified they had formed opinions on the merits of the case and would not be able to set aside those opinions and render a verdict on the evidence alone. Unlike those jurors, Carver testified that he could set aside his preconceived opinions and render a verdict based solely on the evidence presented at trial. After hearing this testimony and observing Carver's demeanor, the trial judge overruled the challenge for cause.

After reviewing the record, we conclude that the trial court did not abuse its discretion in refusing to excuse either Benson or Carver for cause. "Jurors need not be totally ignorant of the facts of the case on which they sit [and] [e]ven the formation of an opinion on the merits will not disqualify a juror if [he] can lay aside [his] opinion and render a verdict based on the evidence presented in court." State v. Sammons, 656 S.W.2d 862, 869 (Tenn. Crim. App. 1982). See also Murphy v. Florida, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 2035-36, 44 L.Ed.2d 589 (1975); Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961); and Adams v. State, 563 S.W.2d 804, 807 (Tenn. 1978).

Accordingly, we find no merit to the defendant's argument.

C. Change of Venue

The next issue we address is whether the trial court erred by denying the defendant's motion for a change of venue due to the pretrial publicity. The defendant contends that because 52 of the 78 prospective jurors were exposed to pretrial publicity mentioning the defendant's criminal record, and that he was suspected of killing a second convenience store clerk in Memphis, the trial court's failure to grant a change of venue deprived him of his right to trial by an impartial jury, his right to due process, and his right to fundamental fairness as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. In support of his argument, the defendant cites Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

The matter of a change of venue addresses itself to the sound discretion of the trial court, and a denial of change of venue will only be reversed on appeal for an affirmative and clear abuse of discretion. State v. Bates, 804 S.W.2d 868, 877 (Tenn. 1991); and State v. Melson, 638 S.W.2d 342, 360 (Tenn. 1982). In this case, we find no abuse of discretion on the part of the trial judge.

In State v. Hoover, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979), the court listed a group of 17 factors to

be considered in determining whether to grant a change of venue. Among these are the nature, extent, and timing of the pretrial publicity. Although there had been publicity about the case, most of it had occurred two years before the trial, and despite the fact that approximately 60 percent of the prospective jurors recalled the occurrence of the offense, none of the jurors who actually heard the case could remember any of the details of the news reports. The facts of this case are very different from the facts in Irvin v. Dowd, supra, the case relied upon by the defendant.

In Irvin v. Dowd, supra, two-thirds of the jurors actually seated had been exposed to a barrage of pretrial publicity right up until the time of trial, had already formed an opinion that the defendant was guilty, and acknowledged familiarity with material facts and circumstances of the case. Irvin, 366 U.S. at 725-28, 81 S.Ct. at 1644-45. In addition, even the headlines of one of the local newspapers reported during jury selection that "impartial jurors are hard to find." Id., 366 U.S. at 727, 81 S.Ct. at 1645. Although each of the jurors said that he could be impartial, the U.S. Supreme Court concluded that "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." Id., 366 U.S. at 728, 81 S.Ct. at 1645.

Unlike the jury in Irvin v. Dowd, the jurors' exposure to pretrial publicity in this case ranged from nonexistent to moderate, and there is no evidence of any "undue excitement against the defendant" in Shelby County which would have precluded a fair trial. See Tenn. R. Crim. P. 21(a). See also State v. Melson, 638 S.W.2d at 360. Accordingly, we find no abuse of discretion in the trial court's denial of the defendant's motion for a change of venue.

D. Oklahoma Preliminary Hearing Testimony

We next consider whether the trial court erred in admitting the testimony of co-defendant, Mona Lisa Watson, given at the defendant's preliminary hearing in Oklahoma on the charges against him in that state for the murder of Charlene Calhoun. The trial court admitted this testimony under the former testimony exception to the hearsay rule, which provides:

> (b) Hearsay exceptions
>
> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony
>
> Testimony given as a witness at another hearing of the same or a different proceeding, . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed. R. Evid. 804(b)(1)(adopted by this Court as a statement of the law in Tennessee in State v. Causby, 706 S.W.2d 628, 631 (Tenn. 1986)).[2] Whenever former testimony is at issue, the underlying question is "whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion." Fed. R. Evid. 804, advisory committee note, 28 U.S.C.A. at 446, subd. (b), except. (1). The rule was designed to ensure fairness in cases when former testimony is admitted. Accordingly, the rule must be given a literal meaning, and each element of the rule must be satisfied before former testimony is admitted. See United States v. Salerno, ___ U.S. ___, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992).

First, the defendant contends that Watson was not unavailable because she did not invoke her privilege against self-incrimination until after the preliminary hearing testimony was admitted and read to the jury. While it would have been a better procedure for the trial court to have Watson invoke the privilege against self-incrimination out of the jury's presence before admitting the preliminary hearing testimony, Watson invoked her privilege against self-incrimination and did not testify during the trial. Since invocation of the privilege against self-incrimination renders a witness unavailable, State v. Armes, 607 S.W.2d 234, 237 (Tenn. 1980), and since the circumstances of the

[2] This case was tried before the Tennessee Rules of Evidence were adopted and became effective on January 1, 1990. Therefore, the federal rule, as adopted in State v. Causby, supra, is the governing standard.

present case conclusively support a finding of unavailability, we find no merit to the defendant's argument.

The defendant next contends that although he had an opportunity to cross examine Watson at the Oklahoma preliminary hearing, he did not have a similar motive to develop her testimony because the preliminary hearing involved separate charges in another state. He also argues that he was represented by a different lawyer in those proceedings, who had no real motive to inquire into or develop the facts relevant to the killing of Alvin Kennedy in Tennessee. As a result, the defendant asserts that admission of the former testimony violated the hearsay rule and his right to confrontation under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution.

The Sixth Amendment to the U.S. Constitution, which is applicable to the states through the Fourteenth Amendment, see Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him."[2] The corresponding provision of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face." Tenn. Const. art. I, § 9. This Court has previously held that the former testimony exception to the hearsay rule has

sufficient "indicia of reliability"[3] so that admission of evidence thereunder comports with the right of confrontation.[4] Accordingly, if Watson's Oklahoma preliminary hearing testimony met the requirements of the former testimony hearsay exception, it would also satisfy the right of confrontation.

In State v. Causby, supra, a first-degree murder case, this Court held that the trial court properly admitted a co-defendant's former testimony from a juvenile transfer hearing under the former testimony exception to the hearsay rule because the defendants had a full opportunity and similar motive to develop the prior testimony. Several factors were considered in reaching that conclusion, but the most emphasis was placed on the fact that at both the transfer hearing and the subsequent trial, the testimony was addressed to the same issue of "[w]hether or not the defendants had committed the offense" charged. Causby, 706 S.W.2d at 632.

Complete identity of the issues is not necessary. Other courts considering what constitutes a similar motive have concluded that if the issues in both cases are sufficiently similar, the requirement of similar motive is satisfied. United States v. Licavoli, 725 F.2d 1040, 1048 (6th Cir. 1984); United States v. Pizarro, 717 F.2d 336, 349 (7th

[2] Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

[3] Causby, 706 S.W.2d at 631.

Cir. 1983); Zenith Radio Corp. v. Matsushita Electric Indus. Co., 505 F.Supp. 1190, 1252 (E.D.Pa. 1980), aff'd in part, rev'd in part, 723 F.2d 319 (3rd Cir. 1983). This conclusion comports with the Advisory Committee Note to Rule 804 that observes: "The common law . . . did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to 'substantial' identity." 28 U.S.C.A. at 447, subd. (b), except. (1); see also Cohen, Paine & Sheppeard, Tennessee Law of Evidence, Sec. 804(b)(2).1, p. 461 (2d ed. 1990).

The defendant's identity as the killer of Alvin Kennedy and Charlene Calhoun was an issue in both the Oklahoma hearing and the Tennessee trial. The testimony identifying the defendant as the killer of Alvin Kennedy circumstantially established the defendant's identity as the killer of Charlene Calhoun, since Kennedy and Calhoun were shot with the same gun. Likewise, Watson's testimony identifying the defendant as the person who shot Charlene Calhoun circumstantially established the defendant's identity as the thief of the Whitsett truck and killer of Alvin Kennedy. Consequently, the defendant had a similar motive to explore the identification issues at the Oklahoma preliminary hearing. See, e.g., Pizarro, 717 F.2d at 349. In fact, the defendant has failed to point to any matter that would have been developed in cross-examination that was not raised in the prior proceedings. Therefore, we conclude that a similar motive existed to develop Watson's preliminary hearing testimony

with respect to the killings of both Charlene Calhoun, and Alvin Kennedy in Tennessee.

It is true that the defendant was not represented by the same counsel in the Oklahoma hearing and the Tennessee trial. However, the rule requires only that the party against whom the testimony is offered have an opportunity and similar motive. An identity of lawyers is not necessary. Tennessee Law of Evidence, at p. 460. Moreover, the facts relating to the murder of Alvin Kennedy were brought out on Watson's cross-examination by the defendant's Oklahoma counsel. "If the party against whom [the testimony] is now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination . . . ." Fed. R. Evid. 804, advisory committee note, 28 U.S.C.A. at 447, subd. (b), except. (1).

Moreover, a party, for tactical reasons, may decide "not to engage in a rigorous cross-examination, or even in any cross-examination at all." Salerno, ____ U.S. at ____, 112 S.Ct. at 2511 (Stephens, J. dissenting). The party may have a similar motive, but simply choose not to act on it. Id.

> [A]s long as the party had a similar motive to develop the testimony in the prior proceeding, there is no unfairness in requiring the party against whom the testimony is now offered to accept her prior decision to develop or not develop the testimony fully.

U.S. v. Salerno, ____ U.S. at ____, 112 S.Ct. at 2511, n.6 (Stevens, J., dissenting)(emphasis added).

As a result of the foregoing, we conclude that defendant's Oklahoma counsel had a similar motive to defendant's Tennessee counsel to develop Watson's testimony about Alvin Kennedy's murder at the preliminary hearing in Oklahoma. Accordingly, we conclude that the admission of Watson's Oklahoma preliminary hearing testimony with respect to the murder of Alvin Kennedy in Memphis did not violate the hearsay rule nor the defendant's confrontation rights under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution.

E. Refusal to Admit Recantation of Watson's Testimony

The defendant next asserts that it was error for the trial court to refuse to allow him to impeach Watson's Oklahoma preliminary hearing testimony with evidence that she recanted her testimony. At trial, the defendant sought to introduce proof from Watson's Oklahoma attorney that after the preliminary hearing in Oklahoma, Watson said she had lied and placed the blame on Howell in order to escape the death penalty herself. The State objected and the trial court agreed, ruling the evidence self-serving hearsay and inadmissible, even for impeachment purposes.

The defendant's contention that evidence of Watson's recantation was not hearsay because it was offered

for impeachment is correct. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c).[5] Statements used for impeachment purposes are not admitted to prove the truth of the statement, but to show that the credibility of the witness is suspect. Cohen, Paine, & Sheppeard, Tennessee Law of Evidence § 801.8, p. 388 (2d ed. 1990). Accordingly, prior inconsistent statements offered for impeachment are not hearsay, id., and the trial court should have allowed the defendant to introduce evidence of Watson's recantation.

Moreover, we agree that the trial court's refusal to allow the defendant to impeach Watson's former testimony with evidence that she later recanted violated his confrontation rights under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution. In addition to protecting a defendant's right to confront the witnesses at the time of trial, the state and federal confrontation clauses also guarantee to the defendant "an opportunity for effective cross examination," Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15, 19 (1985), so that the defendant can "expose to the jury the facts from which jurors . . . [can] appropriately draw inferences relating to the reliability of the witness." Davis v. Alaska, 415 U.S. 308,

[5] Although the Tennessee Rules of Evidence were not in effect at the time of trial, except for the definition of conduct as hearsay, Rule 801 restates Tennessee common law. Tenn. R. Evid. 801, Advisory Commission Comments.

318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974). However, the existence of a constitutional error does not automatically entitle a defendant to a reversal. Since 1967, the U.S. Supreme Court has repeatedly reaffirmed the principle announced in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that an otherwise valid conviction should not be set aside if the reviewing court may say on the whole record that the constitutional error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). Indeed, the U.S. Supreme Court has repeatedly stated that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Van Arsdall, 475 U.S. at 681-82, 106 S.Ct. at 1436-37.

The trial court in Van Arsdall refused to allow the the defendant to impeach the state's key witness by questioning him about the dismissal of a criminal charge against him after he had agreed to speak with the prosecutor about the case against the defendant. The Court agreed with the defendant that the trial court committed constitutional error, but concluded that the error was harmless beyond a reasonable doubt. In so holding, the Court emphasized that:

> The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Reversal for error regardless of its effect on the judgment, encourages litigants to abuse

> the judicial process and bestirs the public to ridicule it.

Van Arsdall, 475 U.S. at 681-82, 106 S.Ct. at 1436-37 (citations and internal quotation marks omitted).

In determining whether the constitutionally improper denial of a defendant's opportunity to impeach a witness is harmless under the Chapman standard, the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, the error was nonetheless harmless beyond a reasonable doubt. Id., 475 U.S. at 684-85, 106 S.Ct. at 1438. A number of factors are relevant to this inquiry including the importance of the witness' testimony in the prosecution's case, the cumulative nature of the testimony, the presence or absence of evidence corroborating or contradicting the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. Id.

There is no doubt that in this case, Watson's former testimony was important to the prosecution's case as the only direct evidence that the defendant killed Kennedy. However, the corroborative proof of her Oklahoma preliminary hearing testimony was overwhelming and the prosecution's overall case was otherwise strong. Moreover, the jury was informed that Watson's testimony at the Oklahoma preliminary hearing was given in exchange for the charges against her being lowered to second-degree murder and a plea recommendation of life imprisonment.

Moreover, the evidence, even excluding the Watson proof, is ample to convict beyond a reasonable doubt. See Causby, 706 S.W.2d at 628 (citations omitted). Witnesses testified that they saw the defendant with the murder weapon the night before Alvin Kennedy was murdered. Another witness testified to the defendant's admission made the night before the murder that he was going to go down hard this time and take some people with him, and still another witness testified to his admission after the Kennedy murder. In addition, the convenience store clerk working at the store across the street from the site of the Kennedy murder testified that Howell and Watson were in her store within minutes of the time the murder was committed, and that they were driving the stolen Whitsett truck. Moreover, ballistics tests showed that the gun found in the defendant's possession by Florida police when he was apprehended was the same gun used to kill Alvin Kennedy in Memphis, and Charlene Calhoun in Oklahoma.

Although this evidence is largely circumstantial, a conviction may be based entirely on circumstantial evidence "where facts are 'so clearly interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone.'" State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985)(quoting State v. Crawford, 225 Tenn. 478, 484, 470 S.W.2d 610, 613 (1971)). Even excluding the Watson proof, we conclude that the circumstantial evidence in the record is ample to point the finger of guilt unerringly at the defendant alone.

After evaluating the relevant factors, we conclude that any doubt cast on Watson's reliability as a witness and her former testimony by impeachment evidence that she later made an unsworn, general statement that the testimony was false would have been minimal. Accordingly, we hold that the trial court's failure to admit evidence that Watson later recanted her preliminary hearing testimony was harmless beyond a reasonable doubt.

F. Redaction of Testimony Regarding Drug Use

The next issue we address is whether the trial court erred in redacting that part of Watson's preliminary hearing testimony which indicated that she and the defendant had been drinking and shooting cocaine before the Kennedy killing. The defendant contends that it was error for the trial court to exclude this testimony because it would have been relevant to the mental state of the defendant and his intent at the time of the murder. The redacted testimony about which the defendant complains was given by Watson at a later preliminary hearing held a week after the first preliminary hearing.

While the defendant raised this issue as error in his motion for a new trial, our review of the record shows that Howell did not request the trial court to include this portion of the record of the Oklahoma proceeding in the proof. Our review of the record also shows that during the trial, the defendant included in the proof other parts of

Watson's testimony regarding the defendant's drug use on the ride from Memphis to Oklahoma.

Accordingly, since the defendant did not request that the proof be admitted during the trial, and did not bring the issue to the trial court's attention until the motion for a new trial was filed, we conclude that this issue has been waived by the defendant. Tenn. R. App. P. 36(a). In addition, because the jury heard other evidence of drug and alcohol use by the defendants on the weekend of the murder, we conclude that the omission of this part of Watson's testimony would have been harmless error even if not waived, especially in light of the fact that the evidence was relevant to intent and mental state, and the defendant was convicted of felony murder, not premeditated murder.

G. Proof of Other Crimes

The last issue raised by the defendant with respect to the guilt phase is whether the trial court erred in admitting evidence of the defendant's commission of other crimes in Oklahoma and Florida. The trial court admitted evidence that the defendant shot Charlene Calhoun in Oklahoma, and had been involved in a shoot-out with police in Florida, on the grounds that the evidence was relevant to the issues of the identity and flight of the defendant.

It is well settled that in a criminal trial, evidence that a defendant has committed some other crime

wholly independent of that for which he is charged, even though it is a crime of the same character, is usually not admissible because it is irrelevant. Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980). In addition, because of the obvious prejudice of such evidence to the defendant, its admission often constitutes prejudicial error, requiring the reversal of a conviction. Id.

However, if evidence that the defendant has committed a crime separate and distinct from the one on trial is relevant to some matter actually in issue in the case on trial, and if its probative value as evidence is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted. Id. Previous cases have held that evidence of crimes other than that for which the defendant was on trial was properly admitted as being relevant to such issues as the identity of the defendant, State v. Taylor, 669 S.W.2d 694, 697-98 (Tenn. 1983), and the defendant's flight or attempt to evade arrest. State v. Zagorski, 701 S.W.2d 808, 813 (Tenn. 1985).

While the defendant admits that his possession of the murder weapon in Oklahoma and Florida was relevant to the murder charges in Tennessee, he contends that the probative value of the details of the offenses committed in those states was outweighed by the prejudicial effect. We disagree..

The fact that Charlene Calhoun had been shot with the same gun used to kill Alvin Kennedy was highly relevant

and critical to proving the defendant's identity as Kennedy's killer. In addition, the fact that the Whitsett truck was found at the scene of Calhoun's shooting was highly relevant to the defendant's identity as Kennedy's killer because the truck had been seen near Loeb's near the time of the murder. Moreover, the proof regarding the killing of Charlene Calhoun was, for the most part, as circumscribed as possible, with the witnesses usually referring to what happened as a "shooting," or "alleged shooting."

The testimony concerning the defendant's apprehension in Florida was more detailed, with the police officers testifying how the defendant shot at them when the car was stopped, and during the high-speed chase. This testimony, however, was relevent to the defendant's guilt as establishing his flight and connecting him with the murder weapon, thereby establishing his guilt as the person who killed Kennedy.

Based upon our review of the record, we conclude that the probative value of the evidence presented regarding the Oklahoma killing, and the Florida shoot-out, outweighed its prejudicial effect. As a result, we hold that the trial court properly admitted this evidence with respect to the defendant's identity and flight. See Zagorski, 701 S.W.2d at 813; and Taylor, 669 S.W.2d at 698.

Next, the defendant contends that even if the trial court properly admitted proof of the other crimes, the

failure of the trial court to instruct the jury that this proof could only be used on the questions of identity and flight amounted to "fundamental error," relying upon our opinion in State v. Reece, 637 S.W.2d 858 (Tenn. 1982). The State, however, contends that the "fundamental error" rule of State v. Reece is inapplicable, and that the defendant waived the issue because he failed to make a special request for the instructions, failed to object to the court's omission of such instructions, and failed to raise the issue in his motion for a new trial.

In State v. Reece, supra, this Court held that where the State's case is weak and prior inconsistent statements admitted for impeachment are extremely damaging, the failure to give a limiting instruction that the statements are only to be considered on the issue of credibility may amount to fundamental error constituting grounds for reversal, even in the absence of a special request. Reece, 637 S.W.2d at 861. This holding, however, was "limited to those exceptional cases in which the impeaching testimony is extremely damaging, the need for a limiting instruction is apparent, and the failure to give it results in substantial prejudice to the rights of the accused." Id.

Our review of the record convinces us that the "fundamental error" rule of State v. Reece, supra, is not applicable to this case. An important factor for the Reece court was the fact that the prior inconsistent statements used to impeach were so damaging that the failure to give a limiting instruction, in essence, allowed the jury to

consider the impeachment evidence as substantive evidence, and thereby allowed inadmissible hearsay evidence to take precedence over testimony given under oath by the witness on the stand. In this case, the testimony about the defendant's other crimes was relevant to his guilt, and no hearsay problems were involved.

Accordingly, although there is a significant possibility of misuse with testimony about a defendant's commission of other crimes, and limiting instructions are critical in preventing the improper and prejudicial use of proof of other crimes, see, e.g., State v. Fisher, 670 S.W.2d 232, 237 (Tenn. Crim. App. 1983), we conclude that the trial court did not commit reversible error in failing to give limiting instructions with respect to the proof of other crimes. The defendant waived the issue by not requesting a limiting instruction and by not raising the issue in his motion for a new trial, Tenn. R. App. P. 3(e), and the failure to give limiting instructions was neither fundamental nor prejudicial error. State v. West, 767 S.W.2d 387, 396 (Tenn. 1989). In this case, the blame for the failure to give limiting instructions "must be laid at the defendant's feet." Laird v. State, 565 S.W.2d 38, 40 (Tenn. Crim. App. 1978).

H. Conclusion

This completes our review of the defendant's contentions with respect to alleged trial court errors in the guilt phase. We find that no reversible error occurred

during the guilt phase and, accordingly, we affirm the defendant's guilt.

PART II.

SENTENCING PHASE

A. Recantation of Preliminary Hearing Testimony

During the sentencing phase, as in the guilt phase, the defendant sought to introduce testimony from Watson's Oklahoma attorney, and the defendant's Oklahoma attorney, that Watson said she lied during the preliminary hearing in order to escape the death penalty herself. The trial court, however, sustained the State's objection to the testimony on the grounds of relevance and hearsay, finding that the evidence did not go to mitigation, but instead was an attempt to re-litigate the innocence of the defendant.

The defendant contends that the trial court's ruling was erroneous because the evidence went to the statutory mitigating circumstance that "[t]he defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor." Tenn. Code Ann. § 39-2-203(j)(5)(1982). In addition, the defendant argues that the trial court's exclusion of this evidence violated his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution. We disagree.

Under the Eighth Amendment, which is applicable to the states through the Fourteenth Amendment, see Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), after restricting the class of death-eligible offenses, a state must utilize additional procedures that assure reliability in the determination that death is the appropriate punishment in a given capital case. See Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). To meet this reliability requirement, a state must permit the sentencer to make an individualized determination on the basis of the character of the individual and the circumstances of the crime. Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235, 251 (1983). Thus, the defendant is entitled to present and have the sentencer fully consider all relevant evidence in mitigation of the sentence. Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1670-71, 90 L.Ed.2d 1, 6 (1986).

We conclude that it was not error to exclude the evidence that Watson later recanted to her lawyers the preliminary hearing testimony in which she identified Howell as the triggerman. The evidence is overwhelming that the defendant was the person who killed Alvin Kennedy, and he had implicitly admitted it to a witness. There is absolutely no proof in the record that Watson was the killer. We find that the evidence of Watson's recantation was irrelevant to the mitigating circumstance set out in Tenn. Code Ann. § 39-2-203(j)(5)(1982) and to the defendant's character or the circumstances of the crime.

B. State's Cross-Examination of Dr. Murphy

The defendant next contends that prejudicial error was committed by the state in the manner in which it used a study to cross-examine Dr. Murphy. On direct examination, Dr. Murphy testified that the tests given the defendant, the results of which showed "definite evidence of brain damage," were very reliable and not susceptible to attempts at malingering or faking by the defendant. On cross-examination, the State asked Murphy, over objection, if he was familiar with the Faust, Hart and Gilmecki study conducted in 1987 in which children had been instructed to fake neuropsychological exams and the results were then sent to qualified experts, such as Murphy for evaluation. Dr. Murphy replied that he was not familiar with the study. The State then proceeded to ask Murphy, over objection, if he would be surprised that 93% of the neuropsychologists had found the tests abnormal "when, in fact, none of them were." Dr. Murphy then explained the limitations of such studies, but conceded that the professional literature in general indicates that psychological tests are sometimes inaccurate and can be faked.

The defendant contends that this line of cross-examination was error because the authoritative nature of the study was not acknowledged by Murphy or established by

independent evidence as required by McCay v. Mitchell, 62 Tenn. App. 424, 463 S.W.2d 710, 720 (1970).*

The State, in response argues that any error was harmless because the jury was instructed that statements, arguments, and remarks of counsel are not evidence and should be disregarded if not supported by the evidence, and because Murphy conceded that although he was not familiar with this particular study, he was aware of other professional literature indicating that psychological tests are sometimes inaccurate and can be faked. We agree.

Requiring proof of the authoritative nature of the study has the "wholesome effect of not permitting this issue to be determined by mere statements of counsel." Id. Here, Dr. Murphy, although he was not familiar with the specific study used by the State, conceded that there is authoritative literature in his field of expertise which indicates that psychological tests are sometimes inaccurate and can be faked. In this context, we conclude that the failure to establish by independent evidence the authoritative nature of the Faust, Hart and Gilmecki study was harm'ess error.

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* Impeachment of an expert by learned treatises is now governed by Rule 618 of the Tennessee Rules of Evidence which restates the holding of McCay v. Mitchell, supra. See Advisory Commission Comments.

C. The Trial Judge's Statement During Sentencing

The defendant next argues that the trial judge's comment to his counsel, "Mr. Jones, I have ruled, it's a matter for the appellate courts," in connection with the objection to the State's use of the Faust, Hart and Gilmecki study, diminished the jury's sense of responsibility for imposing the death penalty and implied the jury's decision was not final in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). We disagree.

Caldwell involved a prosecutor's misleading argument, endorsed by the trial judge, that a jury's death sentence was not final but reviewable on appeal. The statement of the trial court in this case concerned an evidentiary ruling and was directed to the defendant's counsel, not the jury. The asserted Caldwell violation is without merit. See Johnson v. State, 797 S.W.2d 578 (Tenn. 1990); State v. Taylor, 771 S.W.2d 387, 396 (Tenn. 1989).

D. Sympathy Instruction and Argument

Next the defendant argues that the trial court's "anti-sympathy" instruction given at the sentencing and guilt phase of the trial violated his rights under the Eighth Amendment. This issue is without merit. See State v. Smith, 857 S.W.2d 1, 21 (Tenn. 1993); State v. Boyd, 797 S.W.2d 589, 598 (Tenn. 1990).

The defendant also contends that the trial court's refusal to charge the jury, as requested by the defendant, that "you are allowed to consider sympathy elicited based on evidence presented," violated the Eighth Amendment requirement that a jury be allowed to consider any mitigating evidence. The trial court instructed the jury that they were "authorized to weigh and consider any mitigating circumstances . . . raised by the evidence throughout the entire course of the trial," and in addition to informing them of the statutory mitigating circumstances, instructed them that they were to consider "any aspect of the defendant's character or record or any circumstances of the offense favorable to the defendant shown by the proof." The jury was not precluded from considering mitigating evidence by the charge given. The issue is without merit. See Edward v. State, 540 S.W.2d 641, 649 (Tenn. 1976); cf. Smith, 857 S.W.2d at 22 (instruction on mercy); Melson, 638 S.W.2d at 366 (instruction on mercy).

Finally, the defendant contends that the prosecutor's closing argument at the sentencing hearing requesting that the jury not feel sorry for the defendant because of his head injuries and telling them to overcome their sympathy for the defendant violated the Eighth Amendment. Examination of this argument in context reveals that the prosecutor was urging the jury not to return a life sentence based on the mitigating circumstances presented by the defendant. Such argument is proper. This issue has no merit.

E. Constitutionality of the Death Penalty

The defendant first asserts that the death penalty is cruel and unusual punishment. Relying on the dissenting opinion in State v. Dicks, 615 S.W.2d 126, 132 (Tenn. 1981) (Brock, C.J., dissenting), the defendant contends that under all circumstances, the death penalty is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution. We find no merit to this argument, which has been considered and rejected many times by this Court. State v. Bane, 853 S.W.2d 483, 489 (Tenn. 1993); Smith, 857 S.W.2d at 23; State v. Black, 815 S.W.2d 166, 185 (Tenn. 1991); and State v. McCormick, 778 S.W.2d 48, 53 (Tenn. 1989).

Next, the defendant argues that the statute under which he was sentenced, particularly Tenn. Code Ann. § 39-2-203(g)(1982), is unconstitutional because it impermissibly places the burden of proof upon the defendant to prove that mitigating circumstances outweigh aggravating circumstances in violation of the dictates of Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). We find no merit to this argument because "the statute, taken in context, clearly outlines where the burden of proof lies." Boyd, 797 S.W.2d at 596. See also Bane, 853 S.W.2d at 488; Thompson, 768 S.W.2d at 251-52.

The defendant next contends that the sentencing statute is unconstitutional because it impermissibly interferes with the jury's discretion to decline to impose the death penalty, and thereby creates a "presumption of death." The defendant argues that the language providing that if the aggravating "circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death," Tenn. Code Ann. § 39-2-203(g)(1982), requires a sentence of death when the aggravating and mitigating factors are evenly balanced.

This argument was addressed and rejected in State v. Boyd, supra, where we found that "[t]here is no likelihood that this statutory language imposes a "presumption of death." Boyd, 797 S.W.2d at 596. See also Bane, 853 S.W.2d at 488; State v. Wright, 756 S.W.2d 669, 674 (Tenn. 1988); and State v. Teague, 680 S.W.2d 785, 790 (Tenn. 1984). Accordingly, we find no merit to the defendant's argument.

Along the same lines, the defendant argues that "the sentence shall be death" portion of the statutory language quoted above violates Article I, § 19 of the Tennessee Constitution, which requires that "in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases." Howell contends that the "shall" language impermissibly interferes with the jury's absolute discretion to impose its own decision under Article I, § 19.

This argument was addressed and rejected by this Court in Black, supra, where we found that the language of Tenn. Code Ann. § 39-2-203(g)(1982) does not violate Article I, § 19, of the Tennessee Constitution. Id., 815 S.W.2d at 186-87; see also Bane, 853 S.W.2d at 490. Accordingly, we find no merit to this argument.

Next, the defendant contends that the sentencing statute violates the Eighth and Fourteenth Amendments to the U.S. Constitution because it does not require the jury to find beyond a reasonable doubt that the aggravating circumstances are not outweighed by the mitigating circumstances in order to support a death sentence. Once again, this argument has been addressed and rejected by this court. In State v. Thompson, supra, after reviewing the language of Tenn. Code Ann. § 39-2-203 (1982), and the relevant standards under the Eighth Amendment, we concluded that "the phrasing [of the statute] does not operate to preclude consideration of any relevant mitigating factors and that it satisfies the constraints of the eighth amendment." Thompson, 768 S.W.2d at 252; see also Bane, 853 S.W.2d at 489. Accordingly, we find the defendant's argument to be without merit.

The last argument raised by the defendant attacking the constitutionality of the death penalty is that Tennessee's statute fails to sufficiently narrow the class of death eligible defendants under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee

Constitution, because all persons convicted of felony murder are eligible for the death penalty on the sole basis that they committed the underlying felony.

In State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), this Court held that it is unconstitutional under the Tennessee Constitution, Article I, Section 16, to use the felony murder aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(7)(1982) [now § 39-2-204(i)(7)(1991)], to support imposition of the death penalty for a conviction of felony murder, although it can be used to support imposition of the death penalty for premeditated murder. We determined that the use of the felony murder aggravating circumstance duplicated the elements of the underlying crime and failed to narrow the class of death-eligible murderers as required by Article I, Section 16, of the Tennessee Constitution and by the Eighth Amendment to the United States Constitution.[7] We must now determine whether, based on the facts in this case, the sentencing jury's consideration of the invalid felony murder aggravating circumstance is harmless beyond a reasonable doubt where there is one remaining aggravating circumstance consisting of the defendant's prior violent felony convictions, which were introduced in support of the aggravating circumstance at trial. Evidence of the prior

[7] The decision in Middlebrooks was required by Art. I, § 16 of the Tennessee Constitution. We reviewed federal constitutional law in our analysis to determine whether the duplication also violated the Eighth Amendment to the United States Constitution, but Middlebrooks was decided on separate and independent state constitutional grounds. See Middlebrooks, 840 S.W.2d at 346; Zant v. Stephens, 462 U.S. at 877, 103 S.Ct. at 2742.

violent felony convictions included: a 1984 Wyoming conviction for armed robbery; a 1988 Oklahoma conviction for first-degree murder, for which he received the death penalty; a 1988 Florida conviction for attempted murder; and a 1988 Florida conviction for armed robbery.

In Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), the U.S. Supreme Court first applied the Chapman, supra, harmless error analysis to federal constitutional errors occurring in capital sentencing proceedings. Id., 486 U.S. at 261, 108 S.Ct. at 1800. In that case, the constitutional error - admission of evidence in violation of the defendant's Sixth Amendment right to consult with counsel before submitting to a psychiatric examination designed to determine future dangerousness[8] - was not held to be harmless.

Two years later, in Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the Court held that when a sentencing jury in a weighing state has relied, in part, on a constitutionally invalid aggravating circumstance, state appellate courts may reweigh the remaining aggravating circumstances against the mitigating evidence, if permissible under state law, or apply Chapman harmless error analysis. The majority in Clemons held that a reviewing Court is capable of examining the balance struck by the sentencing

[8] See Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

authority, be it judge or jury, and of deciding whether the elimination of an improperly considered aggravating circumstance affected the balance, without denying an individualized determination on the basis of the character of the individual and the circumstances of the crime. Clemons, 494 U.S. at 758, 110 S.Ct. at 1450 (quoting Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), a case in which the plurality found that the Florida Supreme Court could apply harmless error analysis when reviewing a death sentence imposed by a trial judge who, as a matter of state law, erroneously considered a nonstatutory aggravating circumstance).

The Clemons majority did not consider written jury findings concerning mitigating circumstances necessary for effective appellate reweighing or harmless error analysis, but instead commented:

> Nor are we impressed with the claim that without written jury findings concerning mitigating circumstances appellate courts cannot perform their proper role. In Fonzeo and Proffitt, we upheld the Florida death penalty scheme permitting a trial judge to override a jury's recommendation of life, even though there were no written jury findings. An appellate court also is able adequately to evaluate any evidence relating to mitigating factors without the assistance of written jury findings.

Clemons, 494 U.S. at 756, 110 S.Ct. at 1449.

In a more recent case, Stringer v. Black, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), the Court stated

that as applied to a capital sentencing jury's consideration of an invalid aggravating factor, the Chapman harmless error standard requires that an appellate court conclude, beyond a reasonable doubt, that the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating factor. Id., ___ U.S. at ___, 112 S.Ct. at 1137. A lesser requirement would deprive the defendant of the precision that individualized consideration demands. Id. Moreover, "the bald assertion that an error of constitutional dimensions was 'harmless" cannot substitute for a principled explanation of how the court reached that conclusion." Sochor v. Florida, ___ U.S. ___, ____, 112 S.Ct. 2114, 2123, 119 L.Ed.2d 326 (1992)(O'Connor, J. concurring).

This Court, prior to Clemons, concluded that a sentencing jury's consideration of an invalid aggravating circumstance was subject to harmless error analysis. In State v. Bobo, 727 S.W.2d 945 (Tenn. 1987), the State committed error by introducing evidence of another murder for which the defendant had not been convicted to establish the aggravating circumstances of mass murder. We concluded that the error was harmless beyond a reasonable doubt, because the record fully supported two other valid aggravators, and contained little evidence of mitigating circumstances.

Again, in State v. Cone, 665 S.W.2d 87 (Tenn. 1984), four aggravating circumstances were found by the jury; however, this Court found the evidence insufficient to support one of the aggravators, but concluded that the error was harmless beyond a reasonable doubt because the evidence

clearly established the remaining three aggravators found by the jury. See also State v. Workman, 667 S.W.2d 444 (Tenn. 1984) (error in admitting opinion evidence on an ultimate issue, specifically the presence of a statutory aggravating circumstance, was harmless beyond a reasonable doubt because there was overwhelming evidence of the other four remaining aggravating circumstances and a paucity of evidence of mitigating circumstances); State v. Campbell, 664 S.W.2d 281 (Tenn. 1984)(error in admitting evidence of convictions for non-violent felonies in order to establish aggravating circumstance of prior violent felony convictions was harmless beyond a reasonable doubt because evidence of prior violent felony convictions was introduced to support the aggravator, the evidence supporting the two other aggravating circumstances was overwhelming, and there was no evidence of mitigating circumstances).[9]

In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and

[9] Since Clemons, we have reviewed a number of capital cases in which an invalid or unconstitutional aggravating circumstance was considered by the sentencing jury, but have been unable to conclude that the error was harmless. See, e.g, Bane, 853 S.W.2d at 489; Smith, 857 S.W.2d at 25; State v. Evans, 838 S.W.2d 185, 196 (Tenn. 1992); Middlebrooks, 840 S.W.2d at 322; State v. Terry, 813 S.W.2d 420 (Tenn. 1991).

strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.'[10]

When examining the first of these factors, we necessarily consider the number of remaining valid aggravating circumstances since the effect of aggravating circumstances on sentencing usually increases with the number of circumstances proven; but even more crucial than the sum of the remaining aggravating circumstances is the qualitative nature of each circumstance, its substance and persuasiveness, as well as the quantum of proof supporting it. In that respect, the Tennessee statute assigns no relative importance to the various statutory aggravating circumstances. By their very nature, and under the proof in certain cases, however, some aggravating circumstances may be more qualitatively persuasive and objectively reliable than others. That is particularly true of the aggravating circumstance remaining in this case. Tenn. Code Ann.

[10] Other jurisdictions consider similar factors in conducting harmless error analysis. See People v. Sanders, 797 P.2d 561 (Cal. 1990)(jury's consideration of invalid special circumstances did not prejudice the defendant because the prosecutor did not emphasize those factors in his argument to the jury); Preston v. State, 564 So. 2d 120 (Fla. 1990)(court could not conclude that the jury's consideration of an invalid aggravating circumstance was harmless error because prosecutor emphasized the importance of the invalid circumstance in his closing argument, and only two valid aggravating circumstances remained); Shell v. State, 595 So.2d 1323 (Miss. 1992)(court could not conclude jury's consideration of invalid aggravating circumstance harmless because it was argued almost exclusively to the jury and only one valid aggravator remained); Beets v. State, 821 P.2d 1044 (Nev. 1991)(court concluded that the jury's consideration of two invalid aggravating circumstances was harmless beyond a reasonable doubt because there were three other valid aggravators and no mitigating evidence).

§ 39-2-203(i)(2)(1982)(previous convictions of felonies involving the use of violence to the person). In addition, as the present case illustrates, the effect of the aggravating circumstance on the sentence may increase where there is proof of more than one prior violent felony conviction.

The second factor, the extent to which the prosecutor emphasizes the invalid aggravating factor during closing argument, is relevant to the harmless error analysis. However, unlike other state courts[11], we do not consider it the prime factor in the determination of whether the error was harmless beyond a reasonable doubt. The emphasis on the invalid circumstance during argument is but one of several considerations in our analysis.

The third significant factor in harmless error analysis is whether an invalid aggravating circumstance was established by evidence that was materially inaccurate or admissible only to support the invalid aggravator, or whether the evidence was otherwise admissible in either the guilt or sentencing phases of the proceeding. Clemons, 494 U.S. at 758, n.5, 110 S.Ct. at 1451, n.5. In evaluating a jury's consideration of an invalid aggravating factor, it is important to ask whether removal of that factor from the sentencer's consideration also removes any evidence from the jury's total consideration, or whether the State's reliance on the invalid circumstance allowed the jury to improperly

[11] See People v. Sanders, 797 P.2d 561 (Cal. 1990); and other cases cited supra at note 10.

consider any evidence. Even though the jury cannot weigh the invalid aggravating factor against any mitigating factors, the jury can properly consider evidence of the circumstances of the crime and the character of the defendant in making an individualized determination of whether the death sentence is justified. Id. In that respect, an aggravating factor which duplicates the elements of the underlying crime has less relative tendency to prejudicially effect the sentence imposed than invalid aggravating factors which interject inadmissible evidence into the sentencing calculus, or which require the sentencing jury to draw additional conclusions from the guilt phase evidence.[12]

Finally, all the relevant evidence in mitigation must be fully considered in applying harmless error analysis to guarantee that the defendant receives an individualized sentencing determination. Stringer, ___ U.S. at ___, 112 S.Ct. at 1137. As in the case of the remaining valid statutory aggravating circumstance, we examine both the quantum and quality of the mitigating factors presented by the proof.

In the present case, the evidence supporting the remaining aggravating factor of prior violent felony convictions is undisputed and overwhelming. In addition to the cold-blooded execution-style murder of Kennedy in

[12] But see State v. Campbell, supra, in which improper evidence was admitted to support the invalid aggravating circumstance, yet the error was harmless beyond a reasonable doubt based on the record in that case.

Memphis, Tennessee, the defendant committed another similar cold-blooded execution-style murder in Oklahoma within twenty-four hours of Kennedy's murder. Less than thirty days later, he committed an armed robbery in Florida and later engaged in a shoot-out with police officers before his capture, for which he was convicted of attempted murder. A few years earlier, he had been convicted in Wyoming for armed robbery. Moreover, the prosecutor's argument strongly emphasized the defendant's violent felony convictions, with little emphasis on the armed robbery. Furthermore, no additional evidence, nor any evidence that was not already properly before the jury, was introduced in support of the invalid aggravating circumstance. Finally, the mitigating evidence in this case focused on environmental conditions in childhood and psychological testing which was interpreted to demonstrate brain damage. This, in turn, according to the psychologist, impaired the defendant's judgment and ability to appreciate his conduct was wrong. Extensive medical testing, however, failed to show the claimed brain damage. There was virtually no mitigating evidence relating to the good character of the defendant, other than the evidence offered to explain his antisocial behavior.

After a careful review of the record, we conclude beyond a reasonable doubt that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor, and we affirm the sentence of death.

CONCLUSION

We have carefully considered the defendant's contentions as to the alleged errors occurring during the guilt and sentencing phases and conclude the defendant's conviction and death sentence should be affirmed.

In accordance with the mandate of Tenn. Code Ann. § 39-2-205(c)(4)(D)(1982) [now Tenn. Code Ann. § 39-13-206(c)(1)(D)(1991)], we find that the sentence of death was not imposed in an arbitrary fashion, that the evidence overwhelmingly supports the jury's finding of the statutory aggravating circumstance, and that the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance. Further, our comparative proportionality review reveals that the sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and character of the defendant. See State v. Boyd, 797 S.W.2d 589 (Tenn. 1990); State v. Johnson, 762 S.W.2d 110 (Tenn. 1988); State v. Bobo, 727 S.W.2d 945 (Tenn. 1987); State v. King, 694 S.W.2d 941 (Tenn. 1985); State v. McKay, 680 S.W.2d 447 (Tenn. 1985); State v. Harries, 657 S.W.2d 414 (Tenn. 1983); and State v. Simon, 635 S.W.2d 498 (Tenn. 1982).

We, therefore, affirm the conviction of first-degree felony murder and the sentence of death. The sentence will be carried out as provided by law on the 10th day of

February, 1994, unless otherwise ordered by this Court or by other proper authority. Costs of this appeal are assessed against the defendant, Michael Wayne Howell.

RILEY ANDERSON, Justice

Concur:

Reid, C.J. (see separate Concurring Opinion)
Drowota and O'Brien, JJ.
Daughtrey, J., Concurring in the results only

THE STATE OF TENNESSEE

I, SUE R. WALKER, Chief Deputy Clerk of the Supreme Court of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the

OPINION

pronounced by said Court at its April Term, 19 93, in the case of

STATE OF TENNESSEE

against

MICHAEL WAYNE HOWELL

as appears of record not on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the City of Jackson, on this, the

10th day of November A.D., 19 93

Sue R. Walker
CHIEF DEPUTY CLERK

By D.C.

FILED
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APPELLATE CO... CLERK
JACKSON

FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE, Plaintiff-Appellee,	
v.	Shelby Criminal Hon. Joseph B. McCartie, Judge
MICHAEL HOWELL, Defendant-Appellant.	S.C. No. 1

CONCURRING OPINION

I concur in affirming the conviction of first degree murder and the sentence of death.

Since September 1, 1990, the Court has reviewed on direct appeal 13 cases in which the sentence was death.[1] I stated in dissent in State v. Black, 815 S.W.2d 166 (Tenn. 1991), the first case on which I sat in which the

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[1]State v. Tran, _____ S.W.2d _____ (Tenn. 1993); State v. Hurley, _____ S.W.2d _____ (Tenn. 1993); State v. Smith, 857 S.W.2d 1 (Tenn. 1993); State v. Branam, 855 S.W.2d 563 (Tenn. 1993); State v. Caughron, 855 S.W.2d 526 (Tenn. 1993); State v. Bane, 853 S.W.2d 483 (Tenn. 1993); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); State v. Hale, 840 S.W.2d 307 (Tenn. 1992); State v. Harris, 839 S.W.2d 54 (Tenn. 1992); State v. Evans, 838 S.W.2d 185 (Tenn. 1992); State v. Brown, 836 S.W.2d 530 (Tenn. 1992); State v. Black, 815 S.W.2d 166 (Tenn. 1991); State v. Terry, 813 S.W.2d 420 (Tenn. 1991).

sentence of death was affirmed, that whether the imposition of death is cruel and unusual punishment in violation of Article I, Section 16 of the Tennessee Constitution should be reserved until the Court is presented a case in which there are no errors requiring reversal of the conviction or sentence. The case before the Court is the first in which I have participated that is, in my opinion, sufficiently free of error to require consideration of that basic issue.

The District Attorney General and counsel for the defendant obviously were well-prepared for trial; the prosecution presented the case in a forceful but fair and dignified manner. The lawyers for the defendant put the State to its proof on every issue and utilized every apparent opportunity for the benefit of the defendant. The trial judge demonstrated the qualities critically important in conducting a highly emotional and legally exacting trial. The record shows that the case was decided by a competent and impartial jury. The record demonstrates that capital cases can be tried relatively free of error.

I concur in the decision to affirm the sentence, not because Tennessee death penalty law, in my opinion, now meets constitutional standards, but because the procedures followed and the facts proven in this case satisfy the essentials of a constitutionally valid system. I write separately to discuss the constitutionality of the death penalty and, in the context of this case,

deficiencies in Tennessee's death penalty jurisprudence.

CONSTITUTIONALITY OF DEATH PENALTY

In a non-capital case, Trop v. Dulles, 356 U.S. 86, 99-100 (1958), the United States Supreme Court discussed the history and scope of the rights protected by the constitutional provision against cruel and unusual punishment:

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Court recognized in [Weems v. United States, 217 U.S. 349 (1909)] that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

In Gregg v. Georgia, 428 U.S. 153, 171-173 (1976), the Supreme Court expanded upon the requirements of the Eighth Amendment of the United States Constitution:

> Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a

> humane justice." [Weems v. United States, 217 U.S. at 378]. . . .
>
> . . . .
>
> It is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, [356 U.S. at 101]. See also Jackson v. Bishop, 404 F.2d 571, 579 (CA 8 1968). Cf. Robinson v. California, [370 U.S. 660, 666 (1962)]. Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. As we develop below more fully, see infra, at 2926-2927, this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.
>
> But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." Trop v. Dulles, [356 U.S. at 100] (plurality opinion). This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Furman v. Georgia, [408 U.S. 238, 392-93 (1972)] (Burger, C. J., dissenting). See Wilkerson v. Utah, [99 U.S. 130,136 (1878); Weems v. United States, [217 U.S. at 381]. Second, the punishment must not be grossly out of proportion to the severity of the crime. Trop v. Dulles, [356 U.S. at 100] (plurality opinion) (dictum); Weems v. United States, [217 U.S. at 367].

In Gregg v. Georgia, the Supreme Court, rejected the contention that, though historically the death penalty had been the law in every state and was, at least implicitly, recognized by the language of the Eighth Amendment, contemporary society had in 1976 rejected the death penalty as an appropriate and necessary criminal sanction. The Supreme Court concluded that "in the absence of more convincing evidence, . . . death as a punishment for murder is not without justification and thus is not unconstitutionally severe." 428 U.S. at 187.

Consequently, under the federal constitution, when properly made an issue by the pleadings and proof, the determination of whether capital punishment constitutes cruel and unusual punishment requires an assessment of contemporary values in Tennessee concerning the imposition of the penalty of death for a particular offense. That assessment cannot be subjective but must include the consideration of objective indicia which reflect the public attitude. However, public attitude is not conclusive; the assessment must also be consistent with human dignity and must include a finding that capital punishment for the particular offense accomplishes some beneficial social purpose. A similar analysis must be performed under the state constitution, even if this Court should find that the standard for determining whether capital punishment is cruel and unusual is higher than that required by the federal constitution. See State v. Black, 815 S.W.2d 166, 189 (Tenn. 1991). In both cases, there are factual issues that can be resolved only by proof. Since these issues are not

addressed by the pleadings or proof in this case, there is no basis on which this Court can make an assessment of contemporary values in Tennessee under the United States Constitution or the Tennessee Constitution.

DEFICIENCIES IN DEATH PENALTY JURISPRUDENCE

Under state and federal law, this Court bears the responsibility for the development and imposition of a system of death penalty jurisprudence which meets all constitutional and statutory requirements. My view as to the duty of the Court in this regard was set forth in State v. Black:

> Under these circumstances, particularly in light of the nature of the punishment, the imperfection of the judicial system, and the broad discretion vested in the district attorneys general of this State, see State v. Dicks, [615 S.W.2d 126, 136, 140-141 (Tenn. 1981)], this Court should assert its full and independent authority under the State Constitution to assure that the process whereby a defendant is sentenced to death is essentially free of error. This Court, through the exercise of strict appellate review, must require stringent and exact compliance with the Tennessee Constitution and state statutes. The United States Supreme Court has repeatedly emphasized the importance of meaningful appellate review to protect against the unlawful imposition of the death penalty. See Zant v. Stephens, [462 U.S. 862, 876 (1983)]; Barclay v. Florida, [463 U.S. 939, 973 (1983)] (Stevens, J., concurring) ("the question is whether, in its regular practice, the Florida Supreme Court has become a rubber stamp for lower court death-penalty determinations.").

815 S.W.2d at 194-95. Since State v. Black, the Court has

addressed some of the more significant deficiencies in Tennessee death penalty law. Some have been resolved, but, in my view, others have been ignored or treated superficially.

Review of a sentence of death involves, in addition to the assignments of error made by the parties, the examination by the Court of three critical aspects of the case. See State v. Middlebrooks, 840 S.W.2d 317, 351 (1992), (Reid, C.J., concurring and dissenting). The first step is the determination that the sentence of death is not disproportionate to the crime committed, thereby establishing the defendant as a member of the death-eligible class of offenders. Id. The second step is the determination of whether the narrowing process has shown the defendant is among the worst of the death-eligible class. Id. at 351-52. The third step is a comparative proportionality review whereby the Court finds, upon consideration of the defendant and the offense, that the sentence of death is not disproportionate to the penalties imposed in similar cases. Id. at 354-55. Proportionality, as a measure of fairness, is the principle guiding the Court's review. First, the sentence of death is compared with the offense committed; then, the defendant is compared with other death-eligible offenders; and, last, the defendant and the criminal acts on which the sentence is based are compared with other similar offenders and acts committed. This process helps achieve a "'reasoned moral response to the defendant's background, character, and crime,'" see Penry v. Lynaugh, 492 U.S.

302, 318, 109 S. Ct. 2934, 2947 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)), and is designed to select for execution only those most deserving of death, the worst of the bad.

DEFINING THE DEATH-ELIGIBLE CLASS

Review of a case in which the defendant has been sentenced to death logically begins with the definition of the class of death-eligible defendants under the United States Constitution. Under the Eighth and Fourteenth Amendments, death is a disproportionate punishment in all cases except where a defendant kills, attempts to kill, or intends that a killing take place, or that lethal force will be imposed, or where a defendant's personal involvement in the underlying felony is substantial and who exhibits a reckless disregard or indifference to the value of human life. Tison v. Arizona, 481 U.S. 137, 157-158 (1987); Enmund v. Florida, 458 U.S. 782, 797 (1982); State v. Branam, 855 S.W.2d 563, 570-71 (Tenn. 1993); State v. Middlebrooks, 840 S.W.2d 317, 338 (Tenn. 1992).

Superimposed upon this defined group of defendants are additional constitutional and statutory limitations. The federal constitution does not permit all murderers in this death-eligible class to be executed. The process fashioned by the United States Supreme Court for selecting those who ultimately will be executed was summarized in State v. Middlebrooks as follows:

> As a constitutionally necessary first step under the Eighth Amendment, the Supreme Court has required the states to narrow the sentencers' consideration of the death penalty to a smaller,more culpable class of homicide defendants than the pre-Furman class of death-eligible murderers. See Pulley v. Harris, [465 U.S. 37 (1984)]. A state, however, must not only genuinely narrow the class of death eligible defendants, but must do so in a way that reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Zant v. Stephens, [462 U.S. at 877]. A proper narrowing device, therefore, provides a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not, Godfrey v. Georgia, [446 U.S. 420, 433 (1980)], and must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed. Zant [462 U.S. at 879]. As a result, a proper narrowing device insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers--those whose crimes are particularly serious, or for which the death penalty is peculiarly appropriate. See Gregg v. Georgia, [428 U.S. 153 (1976)].

840 S.W.2d at 343. Thus, this Court has recognized that the United States Constitution defines the class of death-eligible defendants but also requires further narrowing by statute or court review.

The State of Tennessee has by constitution and statute further limited those who are death-eligible. As noted in the dissent in State v. Black:

> Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards and do not relegate Tennessee

> citizens to the lowest levels of constitutional protection, those guaranteed by the national constitution.
>
> Indeed, the General Assembly has clearly indicated that when a defendant's life is at stake, citizens of Tennessee are entitled to greater protections than those guaranteed by the United States Constitution. Recognizing higher standards than the United States Supreme Court has found in the federal constitution and reflecting a higher "contemporary standard of decency" in Tennessee, the legislature has forbidden the execution of persons who are under the age of eighteen, T.C.A. § 37-1-134(a)(1), and who are mentally retarded, T.C.A. § 39-13-203. Compare Stanford v. Kentucky , [492 U.S. 361 (1989)] (Eighth Amendment is not violated by imposition of death on sixteen and seventeen year olds); Penry v. Lynaugh, [492 U.S. 302 (1989)] (Eighth Amendment does not prohibit subjecting mentally retarded defendant to death penalty).

815 S.W.2d at 193.

The Court, since Black, has also narrowed the group of death-eligible defendants by finding death to be a disproportionate penalty. In State v. Branam, 855 S.W.2d 563 (Tenn. 1993), the Court found in a unanimous decision that, under the circumstances of that case, death was disproportionate punishment for an accomplice who was not the trigger-man in a felony murder. The Court found in State v. Hale, 840 S.W.2d 307 (Tenn. 1992), that death was disproportionate punishment for misdemeanor child abuse causing the death of the child.

The most significant decision by the Court was State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), which addressed the use of aggravating circumstances to narrow the

death-eligible class to those defendants for whom imposition of the death penalty is most appropriate. In Middlebrooks the Court held that because the felony murder aggravating circumstance, T.C.A. § 39-2-203(i)(7) (1982) [now 39-13-204(i)(7) (Supp. 1993)], essentially duplicated the elements of the offense of first degree felony murder, T.C.A. § 39-2-202(a) (1982) and T.C.A. § 39-2-202(a)(1) (Supp. 1988), it failed to narrow the population of death-eligible felony murder defendants as required by the Eighth Amendment and Article I, Section 16. Middlebrooks, by eliminating felony murder as an aggravating circumstance in first-degree felony murder prosecutions, has accomplished two significant results. It adds a new category of defendants who are immune from the imposition of the sentence of death in those cases where defendants are charged with first-degree felony murder and the only aggravating circumstance is the felony; and, it eliminates felony murder as an aggravating circumstance in selecting those death-eligible defendants who are most deserving of the sentence of death in those ceses where other aggravating circumstances are present.

However, Middlebrooks accomplished only a partial solution. My concurrence and dissent in that case stated:

> This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a "demonstrably smaller and more blameworthy" class of murderers. Maynard v. Cartwright, [486 U.S. 356 (1988)]. However, even with the felony murder aggravating circumstance eliminated, the Tennessee sentencing statute still includes in the class of death-eligible defendants accidental and

> unintentional murderers whose culpability is minimal. It still allows convictions for first degree felony murder of persons who killed accidentally or unintentionally and those who did not kill, did not intend to kill and did not intend that any person suffer any physical harm. The statute still does not effectively limit the class of death-eligible defendants (which is a group different from those actually executed) to those most deserving of death as punishment and, therefore, it violates the Tennessee constitutional prohibition against cruel and unusual punishment.

840 S.W.2d at 350 (Reid, C.J., concurring and dissenting).

I further criticized the majority's reasoning because:

> The result . . . is illogical: an aggravating circumstance that fails to narrow the class because it duplicates the elements of the offense is unconstitutional, but aggravating circumstances that fail to narrow the class for other reasons are not unconstitutional. The logical conclusion from the majority Opinion's analysis would be that any provision of the statute that fails to accomplish the constitutional imperative to narrow the class is invalid.

Id. at 352.

On the authority of Middlebrooks, the Court subsequently reversed the sentence of death and remanded for resentencing in State v. Bane, 853 S.W.2d 483 (Tenn. 1993), in which the aggravating circumstances found by the jury were T.C.A. § 39-13-204 (i)(5), the murder was especially heinous, atrocious or cruel, and (i)(7), felony murder; State v. Evans, 838 S.W.2d 185 (Tenn. 1992), in which the aggravating circumstances were (i)(6), the murder was committed to avoid lawful arrest and (i)(7) felony murder;

and State v. Smith, 857 S.W.2d 1 (Tenn. 1993), in which the aggravating circumstances were (i)(2), previous felony convictions, and (i)(7), felony murder. The defendant in Smith was not, in my view, death-eligible, because the record did not show that the killing was deliberate or intentional or accompanied by a conscious purpose of producing death or a conscious realization that death likely would occur. See Middlebrooks, 840 S.W.2d at 353.

In summary, the federal constitution allows the prosecution to seek a sentence of death for any defendant who himself kills, attempts to kill, or intends that a killing take place or that lethal force will be imposed, or for any defendant whose personal involvement in the underlying felony is substantial and who exhibits a reckless disregard or indifference to the value of human life. However, T.C.A. § 39-13-203 prohibits the imposition of death upon any mentally retarded person; T.C.A. § 37-1-134(a)(1)(A) prohibits the imposition of death upon any person less than 18 years of age; State v. Branam, 855 S.W.2d at 570, raises the level of participation required of a defendant who did not personally wield the lethal agent and may be read to exclude such persons from the death-eligible group; and State v. Hale, 840 S.W.2d at 314, excludes any person who caused the death of another by the commission of an act which is not a felony. Middlebrooks excludes any person charged with felony murder and not charged with some aggravating circumstance other than T.C.A. § 39-13-204 (i)(7), felony murder. Nevertheless, the class still includes some defendants who killed accidentally or

unintentionally and those who did not kill, did not intend to kill, and did not intend that any person suffer physical harm. I would limit the felony murderers eligible for the imposition of the death penalty to those defendants in cases, like the present, in which the proof shows the killing was deliberate or intentional or accompanied by a conscious purpose of producing death or a conscious realization that death will likely occur.

The record in this case shows the defendant is a member of the death-eligible class under both the federal and state constitutions. The defendant's own statement shows the killing was deliberate or intentional.

USE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES TO ACCOMPLISH PARTICULARIZED SENTENCING

At the second stage of the death penalty procedure, at which the jury is required to consider aggravating and mitigating circumstances in order to achieve particularized sentencing, the Court has not given sufficient guidance in the use of aggravating and mitigating circumstances. The Court has, instead, it seems to me, searched for some basis on which to affirm the sentence of death despite a misuse of aggravating circumstances, most often by a finding of harmless error.

This constitutionally mandated function is accomplished by requiring the jury to find beyond a reasonable doubt the existence of one or more statutory

aggravating circumstances and that, beyond a reasonable doubt, the aggravating circumstances outweigh any mitigating circumstances. T.C.A. § 39-13-204(g). Implicit in this exercise is the rational consideration of the substance of each aggravating and mitigating circumstance and an understanding of their practical use in accomplishing the stated purpose of determining that the defendant is not only a member of the death eligible class, but also one of the worst of the death eligible class. There should be sufficient evidence to support each aggravating circumstance found. More than one aggravating circumstance should not be based on the same acts of the defendant. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); but see also State v. Carter, 714 S.W.2d 241 (Tenn. 1986). Aggravating circumstances which are factually inconsistent should not be given effect. See State v. Black, 815 S.W.2d at 197 (Reid, C.J., concurring and dissenting). The jury should be instructed as to the meaning of each aggravating circumstance so as to aid the jury in its application. See, e.g., State v. Hines, 758 S.W.2d 515, 523 (Tenn. 1988); State v. Williams, 690 S.W.2d 517, 527, 532 (Tenn. 1985); State v. Moore, 614 S.W.2d 348, 350-351 (Tenn. 1981).

The problems often associated with the definition and application of aggravating circumstances are not present in this case, even though one invalid aggravating circumstance was charged. The defendant was charged with aggravating circumstances T.C.A. § 39-13-204(i)(2), having previously been convicted of one or more felonies involving violence to the person; (i)(6),committing the murder to

prevent the lawful arrest or prosecution of the defendant; and (i)(7), committing the murder during the course of a felony. The jury found aggravating circumstances (i)(2) and (i)(7). Aggravating circumstance (i)(7) was found in State v. Middlebrooks, 840 S.W.2d at 341-47, to be an invalid aggravating circumstance on the charge of first-degree felony murder, and the case was remanded for re-sentencing. However, the Court has found in this case that charging (i)(7) was harmless error, and has affirmed the sentence of death.

I have indicated previously that harmless error analysis is inappropriate whenever one of the aggravating circumstances found by the jury is found to be invalid on appeal. I still subscribe to that view with regard to the previous cases considered by the Court and in all cases where the Court must make a subjective decision regarding the effect of the aggravating circumstance found to be harmless. However, even though in the present case, the court improperly submitted to the jury the aggravating circumstance of felony murder, T.C.A. § 39-13-204(i)(7), I concur in the majority's finding that under the circumstances of this case, this error was harmless beyond a reasonable doubt, and that the sentence would have been the same had the invalid aggravating circumstance not been charged. Stringer v. Black, 503 U.S. ___, ___, 112 S.Ct. 1130, 1137 (1992).

The issue on harmless error analysis is whether the Court can conclude that beyond a reasonable doubt the

invalid aggravating circumstance did not influence the jury in its determination that the sentence would be death. Id. at 1136. The issue is not the extent to which the aggravating and mitigating circumstances were supported by the evidence or whether the aggravating circumstances outweighed the mitigating circumstances. A finding that the evidence in support of the valid aggravating circumstance was overwhelming and the evidence in mitigation was meager may, and in this case does, support the jury's finding that beyond a reasonable doubt the aggravating circumstance outweighed the mitigating circumstances, but it does not necessarily follow that the jury was not influenced by the invalid aggravating circumstance. And, further, the Court must conclude that admission of the invalid aggravating circumstance was harmless error before it can consider whether the record supports the jury's finding that aggravating circumstances outweighed mitigating circumstances.

In Middlebrooks, the Court found that:

> Even though the evidence amply supports the aggravating circumstance of the murder being especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn.Code Ann. § 39-2-203(i)(5) (1982), we are unable to conclude that the elimination of the aggravating circumstance (i)(7) is harmless error beyond a reasonable doubt.

840 S.W.2d at 347. The dissent in Middlebrooks emphasized that:

> This torture-murder of a kidnapped child unquestionably is one of the most aggravated killings that this Court has seen. The fourteen-year-old victim's ordeal, as described in the majority opinion, began at 7:30 p.m. and ended at 11 p.m. This brutal and tragic murder is certainly one of the "worst of the bad."

Id. at 350 (Drowota, J. concurring and dissenting). However, there was no insistence in the dissent that the admission of aggravating circumstance (i)(7), if error, was harmless error.

The main opinion undertakes a "principled explanation" of its conclusion that admission of the invalid aggravating circumstance was harmless beyond a reasonable doubt. That explanation is that the "quantum and quality" of all relevant evidence in aggravation and mitigation must be examined and fully considered. The problem with this objective and logical procedure is that jurors are not required to be objective or logical in determining the sentence. This Court in State v. Terry, 813 S.W.2d 420 (Tenn. 1991), unanimously found that the erroneous instruction of aggravating circumstance (i)(7) was not harmless error beyond a reasonable doubt. The Court stated, quoting State v. Pritchett, 621 S.W.2d 127, 139 (Tenn. 1981),

> We have no way of knowing and cannot speculate whether the jury would have imposed the death penalty with one of the two aggravating circumstances withdrawn from their consideration and with the necessity of weighing the one remaining aggravating circumstance

against the mitigating circumstances.

State v. Terry, 813 S.W.2d at 425.

The decision of whether a defendant lives or dies "requires a profoundly moral evaluation of the defendant's character and crime," in which the sentencer, by constitutional mandate, "is afforded substantial discretion." Satterwhite v. Texas, 486 U.S. 249, 261 (1988) (Marshall, J., dissenting).

> Because of the moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer, predicting the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise. As the Court recognized in Caldwell v. Mississippi, 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231 (1985), "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." In the same vein, an appellate court is ill equipped to evaluate the effect of a constitutional error on a sentencing determination. Such sentencing judgments, even when guided and channeled, are inherently subjective, and the weight a sentencer gives an instruction or a significant piece of evidence that is later determined to violate a defendant's constitutional rights is nowhere apparent in the record. In McCleskey v. Kemp, [481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)], the Court acknowledged that "[i]ndividual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable,'" and their collective judgment of the appropriate sentence is marked by an "inherent lack of predictability." Id., 481 U.S., at 311, 107 S.Ct., at 1776-1777, quoting Peters v. Kiff, 407 U.S.

> 493, 503, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972) (opinion of Marshall, J.). The threat of an erroneous harmless-error determination thus looms much larger in the capital sentencing context than elsewhere.
>
> • • •
>
> Harmless-error analysis impinges directly on the reliability of the capital sentencing decision by allowing a court to substitute its judgment of what the sentencer would have done in the absence of constitutional error for an actual judgment of the sentencer untainted by constitutional error.

Id. at 262, 263 (Marshall, J., dissenting).

However, even though the Court cannot reasonably discover the impact of erroneously considered material on an essentially subjective decision,[2] a court can conclude beyond a reasonable doubt that there was no evidence before a jury which could influence its decision. It is on this basis that I concur with the finding of harmless error in this case.

The most significant fact in harmless error analysis is whether the error permitted the sentencers to consider evidence that would not otherwise have come before them. Cf. State v. Harris, 839 S.W.2d at 54, 83 (Tenn. 1992) (Reid, C.J., dissenting) (evidence of other offenses not properly before jury absent error at guilt phase). In

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[2]See Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 University of Chicago Law Review 740 (1987).

this case, as stated in the main opinion,[3] the jury heard no evidence in support of the invalid aggravating circumstance that was not admissible to prove the elements of the crime. Submission of the felony murder aggravator to the jury exposed the sentencers to no evidence which they would not have properly heard at the guilt phase even if the State had not relied upon that aggravating circumstance. Under our statute and the federal constitution, the jury can properly consider evidence of the nature, facts and circumstances of the crime in making its determination as to whether a sentence of death is warranted. See T.C.A. § 39-13-204(c) (formerly § 39-2-203(c)); Clemons v. Mississippi, 494 U.S. 738, 748 (1990). The evidence of the offense and its nature was thus properly before the jury at sentencing. Consequently, there was no inadmissible evidence that could have affected the jury's decision. The argument of the prosecutor regarding the invalid aggravating circumstance did not go beyond statements that were permissible with reference to the commission of the offense of which the defendant was convicted. As a result, the jury heard nothing that was not appropriate, except that numerically, there were two aggravating circumstances rather than one. Finding prejudicial error on this super-technical ground would require the absolute rejection of the principle of harmless error found in Rule 52 of the Tennessee Rules of Criminal Procedure and Rule 36(b) of the Tennessee Rules of Appellate Procedure. Where there was in fact error but, as in this case, the error could not have affected the verdict

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[3] See supra p. ____.

of the jury, it is appropriate to find the error was harmless beyond a reasonable doubt.

No issue is made of the aggravating circumstance found under T.C.A. § 39-13-204(i)(2). The record shows that the defendant's prior convictions supporting this aggravating circumstance were two convictions of armed robbery, one conviction of first degree murder and one conviction of attempt to commit first degree murder. The evidence in mitigation was meager. Accordingly, I concur that the record supports the jury's finding that the aggravating circumstance outweighed the mitigating circumstances and the imposition of the sentence of death.

COMPARATIVE PROPORTIONALITY REVIEW

The greatest deficiency in this case, and in the present death penalty law as applied in this state, is the total absence of a meaningful and exacting comparative proportionality review. Where the statute defining a capital offense does not accomplish narrowing, as the Tennessee statute does not, comparative proportionality analysis is a vital component in the constitutional imposition of the death penalty. See Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 3058 (1990); McCleskey v. Kemp, 481 U.S. 279 (1987); Pulley v. Harris, 465 U.S. 37 (1984).

The comparative proportionality review in this case consisted of the conclusory statement, "Further, our

comparative proportionality review reveals that the sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and character of the defendant." This statement is followed by citation to a series of other cases in which the death penalty was imposed. In addition to revealing the lack of any articulated standard for comparative proportionality review, see State v. Harris, 839 S.W.2d at 85 (Reid, C.J., dissenting), the court's opinion also reflects a basic misunderstanding of the purpose of such review. If the case under review is compared only with cases in which the defendant has been sentenced to death, as in the Court's opinion in this case, its similarity to cases in which the sentence of death was not imposed, and, thus, any disproportionality, could not be noted. To make this determination, the Court must also examine first degree murder cases in which the sentence of death is not imposed. Limiting review to those cases in which a sentence of death was given compares the case under review only to the standard for death-eligibility as discussed in step one of the analysis. Supra, p. ____. The same observation was made in State v. Middlebrooks:

> The Court obviously has substituted for the proportionality review required at this third stage of the proceedings a finding that the proof shows the defendant to be a member of the death-eligible group which, under the federal constitution and the Tennessee statute, includes all cases in which the proof meets the threshold standard of reckless indifference. This practice is acknowledged by the statement in Justice Drowota's dissent that the death penalty is not disproportionate punishment so long as the reckless indifference standard of Enmund and Tison is met. Drowota, J., dissenting at 349. Consequently, the Court has not found the punishment disproportionate in any of the 84 cases in which the sentence of death has been imposed since 1977. This fact alone would suggest there has been no effective proportionality review on appeal.

840 S.W.2d at 355.

The need to look beyond cases in which the jury actually imposed a sentence of death in order to assure valid proportionality review is recognized in Rule 12 of the Supreme Court Rules. This Rule sets forth the information regarding the defendant and the offense furnished by the trial judge, on which this Court bases its comparative proportionality review. The Rule requires that the report be completed "in all first-degree murder cases in which life imprisonment or a sentence of death is imposed." (Emphasis supplied.) It thus implicitly establishes all cases resulting in first degree murder convictions as the universe of cases to which this Court must look when determining whether a sentence of death is proportionate.[4] Regardless of

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[4]The question of an appropriate universe for comparative proportionality analysis in death penalty cases is thoroughly reviewed in State v. Marshall, 130 N.J. 109, 613 A.2d 1059 (1992). While Marshall adopted a broader universe than that contained in Rule 12, some other jurisdictions have limited themselves to a review of cases resulting in first degree murder convictions. See e.g., State v. Moore, 210 Neb. 457, 316 N.W.2d 33, 44, cert. denied, 456 U.S. 984 (1982); State v. Rupe, 108 Wash. 2d 734, 743 P.2d 210, 229 (1987) cert. denied, 486 U.S. 1061 (1988).

I also note for comparison with the cursory comparative proportionality analysis applied in this case, the proportionality review procedures employed by the New

whether, as some defendants have argued, Rule 12 provides an insufficient basis for the Court's comparative proportionality review under T.C.A. § 39-13-206(c)(1)(D) (Supp. 1991), the record shows that the majority has not in the present appeal followed the Rule. Compare State v. Barber, 753 S.W.2d 659, 664-665 (Tenn. 1988) (reviewing cases in which life imprisonment and sentences of death were imposed).

Another deficiency in the Court's comparative proportionality review is the absence of any process for determining if geographic or racial patterns of charging and prosecuting capital cases demonstrate an arbitrary exercise of the prosecutorial function. The Court must respect the broad discretionary powers given prosecutors. However, the statutes and the constitution require consistency and reliability in the administration of capital punishment. See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). That ultimate responsibility rests on the Court. Even though statistical information alone regarding the number of prosecutions in a county or judicial district may not be a reliable standard for determining that the death penalty is being arbitrarily and capriciously imposed, the court should collect and review that information which may demonstrate

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Jersey Supreme Court in Marshall and by the courts of other states. See, e.g., Dawson v. State, 581 A.d 1078, 1109-1110 (Del. 1990), vacated on other grounds, ___ U.S. ___, 112 S. Ct. 1093 (1992); Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422, 425 (1980), ; State v. Cummings, 323 N.C. 181, 372 S.E.2d 541, 551-553 (1988), vacated on other grounds, 494 U.S. 1021 (1990); Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700, 707-709, cert. denied, 469 U.S. 963 (1984); State v. Rupe, 743 P.2d at 228-230.

the need for the adoption of a procedure that would ensure the avoidance of any extraneous influences from the race, sex, or status of the defendant or victim, or the resources available to prosecute or defend a case.

An adequate structure for comparative proportionality review cannot be set forth in a dissent. It requires the formulation of standards and the implementation of procedures for collecting and comparing cases and can be accomplished only by action of the court.

Nevertheless, despite the deficiencies in the procedure and information available for a proper comparative proportionality review, comparison of the character of the defendant in this case and the nature of his crime, by any standard of analysis, would show that he is among the worst of the bad. From the opening lines of the proof, which is discussed in detail in the main opinion, the defendant is shown to possess the characteristics most repulsive to society's sense of decency, and most destructive to the very fabric of society. His proclamation that he was "going down hard this time" and he would "be taking some people with him," evinces a total disrespect for life, his own and that of others, and an arrogant and callous defiance of an ordered society, made dangerous by a fatalistic eagerness for violence. The immediate and efficient procurement of the weapon shows a deliberate and deadly purpose. His quick, but calculated, use of the weapon against the stranger at the market demonstrates, in traditional legal language, a heart bent on fatal mischief.

The defendant's deification of the weapon as Jesus Christ exposed a consummate contempt for morality and a gratuitous defilement of the sacred. His utter immorality is matched by the efficient casualness of the murders, once to obtain $111.16 and again to obtain possession of a vehicle. The deliberateness of the murder of the market clerk, his reasoned purpose for the murder, and the enormity of his contempt for life, moral values and the divine are summed up in his statement to the witness Johnson, "Yeah, he wouldn't open the safe, so I told him I would introduce him to Jesus Christ." Even the cold pages of the record show the defendant to be the embodiment of the danger against which people are the most defenseless -- deliberate but meaningless violence unmitigated by even the ordinary human frailties of anger, fear, jealousy, or greed.

The valid aggravating circumstance, the defendant's prior convictions of felonies involving violence to the person, T.C.A. § 39-13-204(i)(2), was compelling. It was shown that the defendant had been twice convicted of armed robbery. He also had been convicted of first degree murder and attempted first degree murder. These violent felonies are among the most serious in any penal code and show the defendant's deliberately violent nature over an extended period of time. The record establishes beyond a reasonable doubt that, upon consideration of the defendant's background and character and the nature and circumstances of the crime, the defendant is among those most deserving of the ultimate sanction.

For the reasons stated in State v. Black, I renew the objection to electrocution as the means of executing the sentence of death; but, I do not consider that grounds for reversal of the sentence.

For these reasons, I concur in the Court's affirmance of the death penalty in this case.

Lyle Reid

Lyle Reid, C.J.

THE STATE OF TENNESSEE

I, SUE R. WALKER, Chief Deputy Clerk of the Supreme Court of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the

CONCURRING OPINION

pronounced by said Court at its April Term, 19 93, in the case of

STATE OF TENNESSEE

against

MICHAEL WAYNE HOWELL

as appears of record not on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the City of Jackson, on this, the

10th day of November A.D., 19 93

Sue R. Walker
CHIEF DEPUTY CLERK

By ..... D.C.

LAFFOON, JACKSON, TN

MOTION FILED
NOV 17 1993

Supreme Court, U.S.
FILED
NOV 17 1993
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No. 92-989

In The

Supreme Court of the United States

October Term, 1993

TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF

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To The Supreme Court Of Tennessee

MOTION OF RESPONDENT FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AFTER ARGUMENT

Pursuant to Rule 25.5 of the *Rules of the Supreme Court of the United States,* Respondent respectfully moves for leave to file the attached Supplemental Brief and Appendix for the purpose of bringing to the Court's attention the intervening decision reproduced in the Appendix.

The relevance of this intervening decision is described in the body of the Supplemental Brief.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

As of November 10, 1993, there can no longer be any dispute that the Tennessee Supreme Court's judgment in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992) is based upon the alternative, adequate and independent state ground of Article I § 16 of the Tennessee Constitution. Therefore, this Court is constitutionally compelled to dismiss the petition for writ of certiorari.

In *State of Tennessee v. Michael Wayne Howell*, ___ S.W.2d ___ (Tenn. Nov. 10, 1993) (opinion attached as Appendix A), the Tennessee Supreme Court has stated unequivocally that *State v. Middlebrooks* rests upon Article I § 16 of the Tennessee Constitution as a separate, alternative, adequate and independent state ground for the judgment in this matter, and that the Tennessee Supreme Court's analysis of Article I § 16 was not compelled by its understanding of federal law:

> The decision in *Middlebrooks* was required by Art. I, § 16 of the Tennessee Constitution. We reviewed federal constitutional law in our analysis to determine whether the duplication *also* violated the Eighth Amendment to the United States Constitution, but *Middlebrooks* was decided on separate and independent state constitutional grounds. *See Middlebrooks*, 840 S.W.2d at 346; *Zant v. Stephens*, 462 U.S. at 877, 103 S.Ct. 2742.

State v. Howell, slip op. at 46 n. 7. (See, Appendix A at p. 46)

Thus, the Tennessee Supreme Court has once again clearly stated its judgment in *State v. Middlebrooks* rests upon the separate, alternative, adequate and independent

state ground of Article I § 16 of the Tennessee Constitution, and this Court lacks jurisdiction to review that judgment. That judgment will remain the same under Article I § 16 of the Tennessee Constitution, regardless of whether this Court finds that the Tennessee sentencing scheme alternatively violates the Eighth Amendment.

This Court lacks jurisdiction to review the judgment.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE, Appellee, vs. MICHAEL WAYNE HOWELL, Appellant.	)	FOR PUBLICATION Filed: November 10, 1993 SHELBY CRIMINAL HON. JOSEPH B. McCARTIE, JUDGE S/C No. 1 (Filed Nov. 10, 1993)

For Appellant:	For Appellee:
W. Mark Ward Assistant Shelby County Public Defender	Charles W. Burson Attorney General & Reporter
A. C. Wharton Shelby County Public Defender Memphis, Tennessee	Debra K. Inglis Assistant Attorney General Nashville, Tennessee

OPINION

CONVICTION AND SENTENCE AFFIRMED.

ANDERSON, J.

In this capital case, the defendant, Michael Wayne Howell, was found guilty of grand larceny and the first-degree felony murder of Alvin Kennedy, but found not guilty of premeditated first-degree murder.[1] In the

---

[1] Howell's co-defendant Watson was convicted of first-degree felony murder and was sentenced by the jury to life

sentencing hearing, the Memphis jury found two aggravating circumstances: (1) that the defendant was previously convicted of one or more felonies which involved the use or threat of violence to the person; and (2) that the murder was committed while the defendant was engaged in committing a felony. Tenn. Code Ann. § 39-2-203(i)(2) and (7) (1982). The jury rejected the aggravating circumstance that the murder was committed to prevent the lawful arrest or prosecution of the defendant, Tenn. Code Ann. § 39-2-203(i)(6) (1982), but found that there were no mitigating circumstances sufficiently substantial to outweigh the other two aggravating circumstances, and sentenced the defendant to death by electrocution. The court ordered the defendant's death sentence to run consecutively with a death sentence for murder in Oklahoma and a 25-year sentence for attempted murder in Florida, which convictions arose out of events that occurred shortly after the Memphis murder.

On appeal, the defendant raises numerous issues for our review, involving alleged errors occurring at trial in the guilt phase. We have carefully considered the defendant's contentions and have decided that none has merit. We, therefore, affirm the defendant's conviction in the guilt phase.

In *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), a majority of this Court concluded that application of the aggravating circumstance set forth in Tenn. Code Ann.

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imprisonment. The court of Criminal Appeals affirmed her conviction, and this Court denied her application to appeal.

§ 39-2-203(i)(7), that the murder occurred while the defendant was engaged in committing a felony, does not narrow the population of death-eligible felony murder defendants as required under the Tennessee and United States Constitutions, because it essentially duplicates the elements of the offense of first-degree felony murder. Applying the *Middlebrooks* holding to this case results in the invalidation of the felony murder aggravating circumstance and requires a determination of whether the jury's consideration of that aggravating circumstance was harmless beyond a reasonable doubt. Upon careful review of the record, we conclude that the submission of the felony murder aggravating circumstance for jury consideration, in this case, is harmless error beyond a reasonable doubt.

We, therefore, affirm the defendant's death sentence.

FACTUAL BACKGROUND

On Saturday, October 31, 1987, between 10:00 a.m. and 1:00 p.m., the defendant and his girlfriend, Mona Lisa Watson, walked to the house of his brother's girlfriend, Cheri Goff. After arriving, the defendant showed Goff a set of keys to the Lynn Whitsett Corporation property in Memphis where he had previously worked, and announced that "he was going to go get him a truck." The defendant also said "he was going down hard this time, and he was going to take some people with him." After making these statements, Goff said the defendant used her telephone to call someone about getting a gun for him. Goff also testified that she had previously seen

the defendant carrying a silver handgun with a white, or bone, handle.

Later that same night, sometime after 8:00 p.m., Terry Lee Ellis drove Howell and Watson to Raines Road and left them at the Ryder Truck Terminal near the Lynn Whitsett property. Earlier, around 7:30 p.m., the defendant and Watson had stopped by the home of Robert Brink, the husband of one of Watson's friends. Brink said Howell asked to borrow some money and used the telephone, but did not stay long.

Around 2:30 a.m. on Sunday, November 1, 1987, the defendant and Watson purchased a candy bar at the Quick-Shop Food Store on Macon in Memphis. Cassandra Henderson, the clerk on duty testified that the defendant was driving a white pickup truck with writing on the door and a workman's rack on the back, which he had parked on the blind side of the store. Henderson also said that as Howell was leaving the store, he bumped into another customer, Rodney Graves, who was entering the store, and a fight broke out between the two men. After the fight, Henderson said she saw the defendant in the store parking lot with a silver pistol. Rodney Graves testified that after the fight, Howell went outside and returned to the front door of the store carrying a silver gun with bone handle, but nothing happened and the defendant left the premises.

Later that day, sometime in the evening of November 1, 1987, the defendant and Watson drove the Whitsett truck to Stanley Johnson's house. Johnson testified that Howell was waving around a nickel-plated .38 caliber pistol with a bone handle, which the defendant referred

to as "Jesus Christ." In addition, Johnson said Howell told him that "anybody messes with us, I'll introduce them to Jesus Christ." Thereafter, between 9:00 and 10:00 p.m., Cheri Goff said she was returning home from a movie with some friends when she saw the defendant driving a white truck with a Lynn Whitsett logo on the side and red sideboards on the back.

At 11:05 p.m. on November 1, 1987, Tennessee Highway Patrol Officer Aaron Chism said he stopped by Loeb's 7-Eleven Market on Whitten Road off Interstate 40 in Shelby County, and saw the victim, Alvin Kennedy, working at his job on the midnight shift. Between 12:20 and 12:40 a.m. that same night, Brian Moser said he came into the Loeb's store to purchase a six-pack of beer, but there was no clerk in the store. As a result, after waiting a few minutes, Moer said he decided to go across the street to the Southland 7-Eleven and purchase his beer.

At 12:45 a.m., Charles Allen stopped at Loeb's 7-Eleven to purchase some gasoline. When he went to pay for his gas, Allen found Kennedy's body lying behind the counter in a pool of blood, the cash register drawer open, and all of the paper money missing. As a result, Allen said he ran across the street to the Southland 7-Eleven and asked the clerk to call the police.

Upon investigation, it was discovered that Kenney had been shot once from close range in the upper right forehead. The wound had immediately rendered him unconscious, and he had died within a short time. It was also discovered that $111.16 was missing from the store. The tape from the cash register indicated that the last transaction had occurred at 12:24 a.m.

Susan Bauer, the clerk at the Southland 7-Eleven across the street from the Loeb's store, testified that she remembered Watson and the defendant purchasing beer and a candy bar at her store around 12:20 a.m., approximately 20 minutes before Allen came in asking her to call the police. She said she remembered when they came in because they parked the Whitsett truck on the blind side of the store, which she thought was suspicious for that time of night.

Later that day, Monday, November 2, 1987, at approximately 9:00 p.m., Charlene Calhoun was shot in the parking lot of her apartment complex near Interstate 40 in Dell City, Oklahoma, and her 1987 Toyota Tercel was stolen. A witness who heard the shooting said he saw a man and a woman get into a light-colored Toyota hatchback and drive away after the shots were fired. The Lynn Whitsett truck was found only 125 feet from the scene of the shooting, with its interior on fire, and the defendant's left palm prints on the truck's fenders.

On the morning of Tuesday, November 3, 1987, Stanley Johnson said he saw Howell and Watson in Memphis, and they were driving a small compact car. The defendant asked Johnson for money and said that "he had a little heat on him [and] had to get out of town." Johnson said he gave Howell $20, and promised to try to raise a couple of hundred dollars more by that evening.

That night, the defendant and Watson came to Johnson's house. After Johnson told the defendant he had not been able to raise any money, Howell asked Johnson to sell his gun for him. When Johnson said he couldn't get $5 for the gun, the defendant decided to keep it. Johnson

also told the defendant that the story of the killing was being broadcast, that his picture was being shown on TV, and it was reported that he killed a man for $17. Johnson testified that he asked the defendant "Why $17?," and Howell replied, "Yeah, he wouldn't open the safe, so I told him I'd introduce him to Jesus Christ if he wouldn't open the safe. You know how I am, Stan. If they're old enough to talk, I wasn't going to leave a witness. They're old enough to die." After giving the defendant $30 and promising to try to find $200 for him by the next night, Johnson said Howell and Watson left, and he never saw them again.

Almost a month later, on November 29, 1987, the defendant and Watson were arrested in Panama City, Florida, after a shoot-out with police and a high-speed chase. They were driving the stolen Toyota from Oklahoma, but had replaced the Oklahoma tags with Tennessee plates from another vehicle. Florida police found a nickel-plated Smith & Wesson .38 revolver with a bone handle on the floorboard of the passenger's side where the defendant had been seated. Ballistics tests indicated that the bullet that had killed Alvin Kennedy had been fired from this gun, as had the bullet taken from the body of Charlene Calhoun in Oklahoma.

The last evidence introduced by the State was the redacted testimony of co-defendant Mona Lisa Watson given in April of 1988 at the defendant's Oklahoma preliminary hearing for the murder of Charlene Calhoun. Watson agreed to testify against the defendant in return for a life sentence. Although she later decided not to testify at both the Tennessee trial and the Oklahoma trial, Watson was questioned on direct examination by the

prosecutors at the Oklahoma preliminary hearing. She testified that she and the defendant had driven Interstate 40 from Memphis to Oklahoma in the Lynn Whitsett truck on November 1 and 2, 1987. Watson said they drank beer and shot cocaine on the trip, and when they got to Dell City, Oklahoma, she said they got off the interstate and stopped at an apartment complex to walk around. After walking around for a few minutes, Watson said Howell shot Charlene Calhoun, the two of them took her car, and they set fire to the Lynn Whitsett truck by igniting lighter fluid she had thrown on the front seat. Then, Watson said she and the defendant drove back to Memphis in Calhoun's car, and thereafter to Florida on November 3, 1987.

On cross-examination during the Oklahoma preliminary hearing, the Oklahoma public defender representing Howell asked Watson questions about a shooting in Memphis prior to their trip to Oklahoma. Watson testified that before going to Oklahoma, she and the defendant had gone into a convenience store in Memphis to purchase a six-pack of beer. After Howell handed her the beer and told her to go to the car, Watson said the defendant pulled a gun and shot the clerk in the head, and that it was the same gun Howell had shown her earlier.

Later, at the Tennessee trial, Howell's defense counsel tried to impeach the preliminary hearing testimony of Watson. He attempted to introduce testimony from Watson's Oklahoma lawyer and the defendant's Oklahoma lawyer that Watson later stated that she had lied during the preliminary hearing in order to escape the death

penalty herself. The Memphis trial judge, however, sustained the State's objection that the evidence was hearsay and self-serving, and ruled the evidence inadmissible. Except for this attempt to impeach Watson's former testimony, the defendant presented no testimony on his behalf at the guilt phase of the trial.

Based upon this evidence, the jury found the defendant guilty of first-degree murder in the perpetration of a felony and grand larceny, but not guilty of premeditated first-degree murder.

In the sentencing phase, the state incorporated the evidence presented at the guilt phase, and introduced proof that the defendant had been convicted of armed robbery in Wyoming in 1980, of first-degree murder in Oklahoma in 1988, and of armed robbery and attempted first-degree murder in Florida in 1988.

In mitigation, the defendant's main theory was that he suffered from brain damage, and therefore his ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was impaired. The defendant's mother testified that Howell was a loving son who had come from a very poor family. She also testified that the defendant's father drank heavily, and the defendant grew up witnessing his father beating her. The defendant's mother testified that Howell, the fifth of nine children, had been born prematurely as a result of one such beating. After being diagnosed as a slow learner and being placed in special education classes, the defendant's mother said Howell finally dropped out of school in the eighth grade and went to work on his father's garbage truck.

The other evidence presented by the defendant's sister and mother demonstrated that he had suffered four head injuries during his life. Once, while working on the garbage truck, the defendant was hit in the head by the truck compactor door and his skull was fractured. Another time, during a fight, one of his brothers hit him in the head and knocked him out with a bumper jack. The third injury occurred when a winch cable broke loose and knocked him unconscious while he was working on a river boat. The last injury occurred when he was knocked unconscious after taking several left hooks during a boxing match in the Wyoming prison.

The defendant's other witness, Dr. Phillip Murphy, a clinical psychologist, testified that he administered a battery of psychological tests to Howell in November of 1988. Dr. Murphy said that the test results showed "definite evidence of brain damage," and that the brain abnormalities impaired Howell's ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law to the extent that his judgment was substantially affected. Dr. Murphy diagnosed the defendant as suffering from chronic organic brain syndrome and a resultant personality disorder. Extensive medical testing, however, failed to show evidence of brain damage.

Based upon the proof, the jury found the existence of two aggravating circumstances beyond a reasonable doubt. The jury found that (1) the defendant was previously convicted of one or more felonies which involved the use or threat of violence to the person, Tenn. Code Ann. § 39-2-203(i)(2) (1982), and (2) that the murder was

committed while the defendant was engaged in committing a felony, Tenn. Code Ann. § 39-2-203(i)(7) (1982). In addition, the jury found that there were no mitigating circumstances sufficiently substantial to outweigh the two aggravating circumstances. As a result, the jury sentenced the defendant to death.

PART I.

GUILT PHASE – TRIAL ERRORS

A. Individual Jury Voir Dire

The first issue raised by the defendant is whether the trial court erred in refusing to allow individual voir dire on the prospective jurors' exposure to pretrial publicity. The defendant contends that many of the jurors had been exposed to pretrial publicity about this crime, the Oklahoma crime, and the Florida crime, and as a result, counsel for the defendant should have been allowed to engage in individual, sequestered voir dire of those prospective jurors. In particular, the defendant argues that his counsel should have been allowed to question jurors concerning the content of the pretrial publicity to which they were exposed.

The ultimate goal of voir dire is to see that jurors are competent, unbiased, and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court. *State v. Harris*, 839 S.W.2d 54, 65 (Tenn. 1992); *State v. Simon*, 635 S.W.2d 498, 508 (Tenn. 1982); *see also Mu'Min v. Virginia*, ___ U.S. ___, 111 S.Ct. 1899, 114 L.Ed.2d 293 (1991). Where the crime is highly publicized, the better procedure is to grant the defendants individual, sequestered, voir dire,

but it is only where there is a "significant possibility" that a juror has been exposed to potentially prejudicial material that individual voir dire is mandated. *Harris*, 839 S.W.2d at 65; *State v. Porterfield*, 746 S.W.2d 441, 447 (Tenn. 1988); and *State v. Claybrook*, 736 S.W.2d 95, 100 (Tenn. 1987). In addition, questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial, but such questions are not constitutionally compelled, and the trial court's failure to ask these questions is not reversible error unless it rendered the defendant's trial fundamentally unfair. *Mu'Min v. Virginia*, ___ U.S. at ___, 111 S.Ct. at 1905.

In this case, the record demonstrates that of the 78 prospective jurors examined, around 52, or about 64 percent, had some pretrial exposure to the case, either at the time the crime was committed, or shortly before the trial began. The trial court refused individual voir dire of all jurors who had heard or read something about the case but did not remember specific details, but the court indicated that individual voir dire would be permitted for those jurors who indicated that they did remember the specific content of news reports. However, none of the jurors who actually heard the case indicated that they remembered specific details of any of the pretrial publicity. In addition, those members of the jury who were exposed to pretrial publicity stated that they could and would render an impartial verdict based solely on the evidence presented at trial.

Based upon this record, we conclude that the trial court did not abuse its discretion in refusing to allow individual voir dire of prospective jurors with respect to

the content of pretrial news reports to which they had been exposed. A trial court's findings of juror impartiality may be overturned only for "manifest error," *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S.Ct. 2885, 2889, 81 L.Ed.2d 847 (1984), and we find no such error on this record.

Next, the defendant contends that the trial court's failure to allow him to ask prospective jurors exactly what they knew about the case from the pretrial publicity impaired his right to use his peremptory challenges intelligently and violated his rights to due process, and his right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the U.S. Constitution.

It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury, *see Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), and the use of peremptory challenges is a means to achieve the end of an impartial jury. *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988). However, although the right to exercise peremptory challenges is "one of the most important of the rights secured to the accused," *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965), the right to exercise peremptory challenges is not of constitutional dimension. *Ross*, 487 U.S. at 88, 108 S.Ct. at 2278.

As long as the jury that sits is impartial, the denial or impairment of the right to exercise peremptory challenges does not violate the Sixth Amendment. *Id.* In addition, because peremptory challenges are a creature of statute and are not required by the Constitution, denial or

impairment of the right to exercise peremptory challenges does not violate the due process clause of the Fourteenth Amendment as long as the defendant receives what the state law provides. *Id.*, 487 U.S. at 89, 108 S.Ct. at 2279.

In this case, the defendant was permitted to exercise all 15 of the peremptory challenges a death-eligible defendant is allowed under Tenn. R. Crim. P. 24, and the record does not support a charge of systematic impairment of his ability to exercise those challenges. In addition, there is no evidence that the jury which ultimately heard the case was unfair or partial.

Accordingly, we find no reversible error as a result of the restriction of voir dire.

B. Jury Voir Dire and Challenges For Cause

The next issue we address is whether the trial court erred in failing to strike certain prospective jurors for cause because they admitted to having preconceived opinions about the case. The defendant argues that two jurors should have been excused for cause under Tenn. R. Crim. P. 24(b)(2), which provides, in part, that if a juror "admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial."

A trial court has wide discretion in ruling on the qualifications of a juror, *State v. Kilburn*, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989), but irrespective of whether the trial judge should have excluded the two challenged jurors for cause, any error in this regard is harmless

unless the jury who heard the case was not fair and impartial. *State v. Thompson*, 768 S.W.2d 239, 246 (Tenn. 1989). It is a long-settled principle that a defendant who disagrees with a trial court's ruling on for cause challenges must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise peremptory challenges to remove the jurors. Even then, however, the failure to correctly exclude a juror for cause is grounds for reversal only if the defendant exhausts all of his peremptory challenges and an incompetent juror is forced upon him. *Ross*, 487 U.S. at 89, 108 S.Ct. at 2279; and *State v. Jones*, 789 S.W.2d 545, 549 (Tenn. 1990).

The record reflects that one of the challenged jurors, Michael Benson, did not serve on the jury. Accordingly, any error in refusing to excuse him for cause in and of itself does not entitle the defendant to a new trial unless the jury that ultimately heard the case was not fair and impartial. *State v. Thompson*, 768 S.W.2d at 246.

The record also reflects, however, that the other challenged juror, Ricky Carver, did serve on the jury. On voir dire by the State, Carver stated that he had opinions but believed he could set aside any preconceived opinion and require the State to prove beyond a reasonable doubt that the defendant was guilty.

The trial judge excused other jurors for cause after they testified they had formed opinions on the merits of the case and would not be able to set aside those opinions and render a verdict on the evidence alone. Unlike those jurors, Carver testified that he could set aside his preconceived opinions and render a verdict based solely on the evidence presented at trial. After hearing this testimony

and observing Carver's demeanor, the trial judge overruled the challenge for cause.

After reviewing the record, we conclude that the trial court did not abuse its discretion in refusing to excuse either Benson or Carver for cause. "Jurors need not be totally ignorant of the facts of the case on which they sit [and] [e]ven the formation of an opinion on the merits will not disqualify a juror if [he] can lay aside [his] opinion and render a verdict based on the evidence presented in court." *State v. Sammons*, 656 S.W.2d 862, 869 (Tenn. Crim. App. 1982). *See also Murphy v. Florida*, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 2035-36, 44 L.Ed.2d 589 (1975); *Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961); and *Adams v. State*, 563 S.W.2d 804, 807 (Tenn. 1978).

Accordingly, we find no merit to the defendant's argument.

C. Change of Venue

The next issue we address is whether the trial court erred by denying the defendant's motion for a change of venue due to the pretrial publicity. The defendant contends that because 52 of the 78 prospective jurors were exposed to pretrial publicity mentioning the defendant's criminal record, and that he was suspected of killing a second convenience store clerk in Memphis, the trial court's failure to grant a change of venue deprived him of his right to trial by an impartial jury, his right to due process, and his right to fundamental fairness as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. In support of his argument, the defendant

cites *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

The matter of a change of venue addresses itself to the sound discretion of the trial court, and a denial of change of venue will only be reversed on appeal for an affirmative and clear abuse of discretion. *State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991); and *State v. Melson*, 638 S.W.2d 342, 360 (Tenn. 1982). In this case, we find no abuse of discretion on the part of the trial judge.

In *State v. Hoover*, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979), the court listed a group of 17 factors to be considered in determining whether to grant a change of venue. Amount these are the nature, extent, and timing of the pretrial publicity. Although there had been publicity about the case, most of it had occurred two years before the trial, and despite the fact that approximately 60 percent of the prospective jurors recalled the occurrence of the offense, none of the jurors who actually heard the case could remember any of the details of the news reports. The facts of this case are very different from the facts in *Irvin v. Dowd, supra*, the case relied upon by the defendant.

In *Irvin v. Dowd, supra*, two-thirds of the jurors actually seated had been exposed to barrage of pretrial publicity right up until the time of trial, had already formed an opinion that the defendant was guilty, and acknowledged familiarity with material facts and circumstances of the case. *Irvin*, 366 U.S. at 725-28, 81 S.Ct. at 1644-45. In addition, even the headlines of one of the local newspapers reported during jury selection that "impartial jurors are hard to find." *Id.*, 366 U.S. at 727, 81 S.Ct. at

1645. Although each of the jurors said that he could be impartial, the U.S. Supreme Court concluded that "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." *Id.*, 366 U.S. at 728, 81 S.Ct. at 1645.

Unlike the jury in *Irvin v. Dowd*, the jurors' exposure to pretrial publicity in this case ranged from nonexistent to moderate, and there is no evidence of any "undue excitement against the defendant" in Shelby County which would have precluded a fair trial. *See* Tenn. R. Crim. p. 21(a). *See also State v. Melson*, 638 S.W.2d at 360. Accordingly, we find no abuse of discretion in the trial court's denial of the defendant's motion for a change of venue.

D. Oklahoma Preliminary Hearing Testimony

We next consider whether the trial court erred in admitting the testimony of co-defendant, Mona Lisa Watson, given at the defendant's preliminary hearing in Oklahoma on the charges against him in that state for the murder of Charlene Calhoun. The trial court admitted this testimony under the former testimony exception to the hearsay rule, which provides:

> (b) Hearsay exceptions
>
> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony
>
> Testimony given as a witness at another hearing of the same or a different proceeding, . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed. R. Evid. 804(b)(1) (adopted by this Court as a statement of the law in Tennessee in *State v. Causby*, 706 S.W.2d 628, 631 (Tenn. 1986)).[2] Whenever former testimony is at issue, the underlying question is "whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion." Fed. R. Evid. 804, advisory committee note, 28 U.S.C.A. at 446, subd. (b), except. (1). The rule was designed to ensure fairness in cases when former testimony is admitted. Accordingly, the rule must be given a literal meaning, and each element of the rule must be satisfied before former testimony is admitted. *See United States v. Salerno*, ___ U.S. ___, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992).

First, the defendant contends that Watson was not unavailable because she did not invoke her privilege against self-incrimination until after the preliminary hearing testimony was admitted and read to the jury. While it would have been a better procedure for the trial court to have Watson invoke the privilege against self-

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[2] This case was tried before the Tennessee Rules of Evidence were adopted and became effective on January 1, 1990. Therefore, the federal rule, as adopted in *State v. Causby, supra*, is the governing standard.

incrimination out of the jury's presence before admitting the preliminary hearing testimony, Watson invoked her privilege against self-incrimination and did not testify during the trial. Since invocation of the privilege against self-incrimination renders a witness unavailable, *State v. Armes*, 607 S.W.2d 234, 236 (Tenn. 1980), and since the circumstances of the present case conclusively support a finding of unavailability, we find no merit to the defendant's argument.

The defendant next contends that although he had an opportunity to cross examine Watson at the Oklahoma preliminary hearing, he did not have a similar motive to develop her testimony because the preliminary hearing involved separate charges in another state. He also argues that he was represented by a different lawyer in those proceedings, who had no real motive to inquire into or develop the facts relevant to the killing of Alvin Kennedy in Tennessee. As a result, the defendant asserts that admission of the former testimony violated the hearsay rule and his right to confrontation under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution.

The Sixth Amendment to the U.S. Constitution, which is applicable to the states through the Fourteenth Amendment, *see Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." The corresponding provision of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face." Tenn. Const. art. I, § 9. This Court has previously held

that the former testimony exception to the hearsay rule has sufficient "indicia of reliability"[3] so that admission of evidence thereunder comports with the right of confrontation.[4] Accordingly, if Watson's Oklahoma preliminary hearing testimony met the requirements of the former testimony hearsay exception, it would also satisfy the right of confrontation.

In *State v. Causby, supra*, a first-degree murder case, this Court held that the trial court properly admitted a co-defendant's former testimony from a juvenile transfer hearing under the former testimony exception to the hearsay rule because the defendants had a full opportunity and similar motive to develop the prior testimony. Several factors were considered in reaching that conclusion, but the most emphasis was placed on the fact that at both the transfer hearing and the subsequent trial, the testimony was addressed to the same issue of "[w]hether or not the defendants had committed the offense" charged. *Causby*, 706 S.W.2d at 632.

Complete identity of the issues is not necessary. Other courts considering what constitutes a similar motive have concluded that if the issues in both cases are sufficiently similar, the requirement of similar motive is satisfied. *United States v. Licavoli*, 725 F.2d 1040, 1048 (6th Cir. 1984); *United States v. Pizarro*, 717 F.2d 336, 349 (7th Cir. 1983); *Zenith Radio Corp. v. Matsushita Electric Indus. Co.*, 505 F.Supp. 1190, 1252 (E.D.Pa. 1980), *aff'd* in part,

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[3] *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

[4] *Causby*, 706 S.W.2d at 631.

rev'd in part, 723 F.2d 319 (3rd Cir. 1983). This conclusion comports with the Advisory Committee Note to Rule 804 that observes: "The common law . . . did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to 'substantial' identity." 28 U.S.C.A. at 447, subd. (b), except. (1); *see also* Cohen, Paine & Sheppeard, *Tennessee Law of Evidence*, Sec. 804(b)(2).1, p. 461 (2d ed. 1990).

The defendant's identity as the killer of Alvin Kennedy and Charlene Calhoun was an issue in both the Oklahoma hearing and the Tennessee trial. The testimony identifying the defendant as the killer of Alvin Kennedy circumstantially established the defendant's identity as the killer of Charlene Calhoun, since Kennedy and Calhoun were shot with the same gun. Likewise, Watson's testimony identifying the defendant as the person who shot Charlene Calhoun circumstantially established the defendant's identity as the thief of the Whitsett truck and killer of Alvin Kennedy. Consequently, the defendant had a similar motive to explore the identification issues at the Oklahoma preliminary hearing. *See, e.g., Pizarro*, 717 F.2d at 349. In fact, the defendant has failed to point to any matter that would have been developed in cross-examination that was not raised in the prior proceedings. Therefore, we conclude that a similar motive existed to develop Watson's preliminary hearing testimony with respect to the killings of both Charlene Calhoun, and Alvin Kennedy in Tennessee.

It is true that the defendant was not represented by the same counsel in the Oklahoma hearing and the

Tennessee trial. However, the rule requires only that the party against whom the testimony is offered have an opportunity and similar motive. An identity of lawyers is not necessary. *Tennessee Law of Evidence*, at p. 460. Moreover, the facts relating to the murder of Alvin Kennedy were brought out on Watson's cross-examination by the defendant's Oklahoma counsel. "If the party against whom [the testimony] is now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination. . . . " Fed. R. Evid. 804, advisory committee note, 28 U.S.C.A. at 447, subd. (b), except. (1).

Moreover, a party, for tactical reasons, may decide "not to engage in a rigorous cross-examination, or even in any cross-examination at all." *Salerno*, ___ U.S. at ___, 112 S.Ct. at 2511 (Stephens, J. dissenting). The party may have a similar motive, but simply choose not to act on it. *Id.*

> [A]s long as the party had a similar motive to develop the testimony in the prior proceeding, *there is no unfairness in requiring the party against whom the testimony is now offered to accept her prior decision to develop or not develop the testimony fully.*

U.S. v. Salerno, ___ U.S. at ___, 112 S.Ct. at 2511, n.6 (Stevens, J., dissenting) (emphasis added).

As a result of the foregoing, we conclude that defendant's Oklahoma counsel had a similar motive to defendant's Tennessee counsel to develop Watson's testimony about Alvin Kennedy's murder at the preliminary hearing in Oklahoma. Accordingly, we conclude that the

admission of Watson's Oklahoma preliminary hearing testimony with respect to the murder of Alvin Kennedy in Memphis did not violate the hearsay rule nor the defendant's confrontation rights under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution.

E. Refusal to Admit Recantation of Watson's Testimony

The defendant next asserts that it was error for the trial court to refuse to allow him to impeach Watson's Oklahoma preliminary hearing testimony with evidence that she recanted her testimony. At trial, the defendant sought to introduce proof from Watson's Oklahoma attorney that after the preliminary hearing in Oklahoma, Watson said she had lied and placed the blame on Howell in order to escape the death penalty herself. The State objected and the trial court agreed, ruling the evidence self-serving hearsay and inadmissible, even for impeachment purposes.

The defendant's contention that evidence of Watson's recantation was not hearsay because it was offered for impeachment is correct. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c).[5] Statements used for impeachment purposes are not admitted to

[5] Although the Tennessee Rules of Evidence were not in effect at the time of trial, except for the definition of conduct as hearsay, Rule 801 restates Tennessee common law. Tenn. R. Evid. 801, Advisory Commission Comments.

prove the truth of the statement, but to show that the credibility of the witness is suspect. Cohen, Paine, & Sheppeard, *Tennessee Law of Evidence* § 801.8, p. 388 (2d ed. 1990). Accordingly, prior inconsistent statements offered for impeachment are not hearsay, *id.*, and the trial court should have allowed the defendant to introduce evidence of Watson's recantation.

Moreover, we agree that the trial court's refusal to allow the defendant to impeach Watson's former testimony with evidence that she later recanted violated his confrontation rights under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Article I, § 9 of the Tennessee Constitution. In addition to protecting a defendant's right to confront the witnesses at the time of trial, the state and federal confrontation clauses also guarantee to the defendant "an opportunity for effective cross examination," *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15, 19 (1985), so that the defendant can "expose to the jury the facts from which jurors . . . [can] appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974). However, the existence of a constitutional error does not automatically entitle a defendant to a reversal. Since 1967, the U.S. Supreme Court has repeatedly reaffirmed the principle announced in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that an otherwise valid conviction should not be set aside if the reviewing court may say on the whole record that the constitutional error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d

674 (1986). Indeed, the U.S. Supreme Court has repeatedly stated that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Van Arsdall*, 475 U.S. at 681-82, 106 S.Ct. at 1436-37.

The trial court in *Van Arsdall* refused to allow the defendant to impeach the state's key witness by questioning him about the dismissal of a criminal charge against him after he had agreed to speak with the prosecutor about the case against the defendant. The Court agreed with the defendant that the trial court committed constitutional error, but concluded that the error was harmless beyond a reasonable doubt. In so holding, the Court emphasized that:

> The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Reversal for error regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

Van Arsdall, 475 U.S. at 681-82, 106 S.Ct. at 1436-37 (citations and internal quotation marks omitted).

In determining whether the constitutionally improper denial of a defendant's opportunity to impeach a witness is harmless under the *Chapman* standard, the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, the error was nonetheless harmless beyond a reasonable

doubt. *Id.*, 475 U.S. at 684-85, 106 S.C. at 1438. A number of factors are relevant to this inquiry including the importance of the witness' testimony in the prosecution's case, the cumulative nature of the testimony, the presence or absence of evidence corroborating or contradicting the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *Id.*

There is no doubt that in this case, Watson's former testimony was important to the prosecution's case as the only direct evidence that the defendant killed Kennedy. However, the corroborative proof of her Oklahoma preliminary hearing testimony was overwhelming and the prosecution's overall case was otherwise strong. Moreover, the jury was informed that Watson's testimony at the Oklahoma preliminary hearing was given in exchange for the charges against her being lowered to second-degree murder and a plea recommendation of life imprisonment.

Moreover, the evidence, even excluding the Watson proof, is ample to convict beyond a reasonable doubt. *See Causby*, 706 S.W.2d at 628 (citations omitted). Witnesses testified that they saw the defendant with the murder weapon the night before Alvin Kennedy was murdered. Another witness testified to the defendant's admission made the night before the murder that he was going to go down hard this time and take some people with him, and still another witness testified to his admission after the Kennedy murder. In addition, the convenience store clerk working at the store across the street from the site of the Kennedy murder testified that Howell and Watson were in her store within minutes of the time the murder was

committed, and that they were driving the stolen Whitsett truck. Moreover, ballistics tests showed that the gun found in the defendant's possession by Florida police when he was apprehended was the same gun used to kill Alvin Kennedy in Memphis, and Charlene Calhoun in Oklahoma.

Although this evidence is largely circumstantial, a conviction may be based entirely on circumstantial evidence "where facts are 'so clearly interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone.' " *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985) (quoting *State v. Crawford*, 225 Tenn. 478, 484, 470 S.W.2d 610, 613 (1971)). Even excluding the Watson proof, we conclude that the circumstantial evidence in the record is ample to point the finger of guilt unerringly at the defendant alone.

After evaluating the relevant factors, we conclude that any doubt case on Watson's reliability as a witness and her former testimony by impeachment evidence that she later made an unsworn, general statement that the testimony was false would have been minimal. Accordingly, we hold that the trial court's failure to admit evidence that Watson later recanted her preliminary hearing testimony was harmless beyond a reasonable doubt.

F. Redaction of Testimony Regarding Drug Use

The next issue we address is whether the trial court erred in redacting that part of Watson's preliminary hearing testimony which indicated that she and the defendant

had been drinking and shooting cocaine before the Kennedy killing. The defendant contends that it was error for the trial court to exclude this testimony because it would have been relevant to the mental state of the defendant and his intent at the time of the murder. The redacted testimony about which the defendant complains was given by Watson at a later preliminary hearing held a week after the first preliminary hearing.

While the defendant raised this issue as error in his motion for a new trial, our review of the record shows that Howell did not request the trial court to include this portion of the record of the Oklahoma proceeding in the proof. Our review of the record also shows that during the trial, the defendant included in the proof other parts of Watson's testimony regarding the defendant's drug use on the ride from Memphis to Oklahoma.

Accordingly, since the defendant did not request that the proof be admitted during the trial, and did not bring the issue to the trial court's attention until the motion for a new trial was filed, we conclude that this issue has been waived by the defendant. Tenn. R. App. P. 36(a). In addition, because the jury heard other evidence of drug and alcohol use by the defendants on the weekend of the murder, we conclude that the omission of this part of Watson's testimony would have been harmless error even if not waived, especially in light of the fact that the evidence was relevant to intent and mental state, and the defendant was convicted of felony murder, not premeditated murder.

G. Proof of Other Crimes

The last issue raised by the defendant with respect to the guilt phase is whether the trial court erred in admitting evidence of the defendant's commission of other crimes in Oklahoma and Florida. The trial court admitted evidence that the defendant shot Charlene Calhoun in Oklahoma, and had been involved in a shoot-out with police in Florida, on the grounds that the evidence was relevant to the issues of the identity and flight of the defendant.

It is well settled that in a criminal trial, evidence that a defendant has committed some other crime wholly independent of that for which he is charged, even though it is a crime of the same character, is usually not admissible because it is irrelevant. *Bunch v. State*, 605 S.W.2d 227, 229 (Tenn. 1980). In addition, because of the obvious prejudice of such evidence to the defendant, its admission often constitutes prejudicial error, requiring the reversal of a conviction. *Id.*

However, if evidence that the defendant has committed a crime separate and distinct from the one on trial is relevant to some matter actually in issue in the case on trial, and if its probative value as evidence is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted. *Id.* Previous cases have held that evidence of crimes other than that for which the defendant was on trial was properly admitted as being relevant to such issues as the identity of the defendant, *State v. Taylor*, 669 S.W.2d 694, 697-98 (Tenn. 1983), and the defendant's flight or attempt to evade arrest. *State v. Zagorski*, 701 S.W.2d 808, 813 (Tenn. 1985).

While the defendant admits that his possession of the murder weapon in Oklahoma and Florida was relevant to the murder charges in Tennessee, he contends that the probative value of the details of the offenses committed in those states was outweighed by the prejudicial effect. We disagree.

The fact that Charlene Calhoun had been shot with the same gun used to kill Alvin Kennedy was highly relevant and critical to proving the defendant's identity as Kennedy's killer. In addition, the fact that the Whitsett truck was found at the scene of Calhoun's shooting was highly relevant to the defendant's identity as Kennedy's killer because the truck had been seen near Loeb's near the time of the murder. Moreover, the proof regarding the killing of Charlene Calhoun was, for the most part, as circumscribed as possible, with the witnesses usually referring to what happened as a "shooting," or "alleged shooting."

The testimony concerning the defendant's apprehension in Florida was more detailed, with the police officers testifying how the defendant shot at them when the car was stopped, and during the high-speed chase. This testimony, however, was relevant to the defendant's guilt as establishing his flight and connecting him with the murder weapon, thereby establishing his guilt as the person who killed Kennedy.

Based upon our review of the record, we conclude that the probative value of the evidence presented regarding the Oklahoma killing, and the Florida shoot-out, outweighed its prejudicial effect. As a result, we hold that the trial court properly admitted this evidence with

respect to the defendant's identity and flight. *See Zagorski,* 701 S.W.2d at 813; and *Taylor,* 669 S.W.2d at 698.

Next, the defendant contends that even if the trial court properly admitted proof of the other crimes, the failure of the trial court to instruct the jury that this proof could only be used on the questions of identity and flight amounted to "fundamental error," relying upon our opinion in *State v. Reece,* 637 S.W.2d 858 (Tenn. 1982). The State, however, contends that the "fundamental error" rule of *State v. Reece* is inapplicable, and that the defendant waived the issue because he failed to make a special request for the instructions, failed to object to the court's omission of such instructions, and failed to raise the issue in his motion for a new trial.

In *State v. Reece, supra,* this Court held that where the State's case is weak and prior inconsistent statements admitted for impeachment are extremely damaging, the failure to give a limiting instruction that the statements are only to be considered on the issue of credibility may amount to fundamental error constituting grounds for reversal, even in the absence of a special request. *Reece,* 637 S.W.2d at 861. This holding, however, was "limited to those exceptional cases in which the impeaching testimony is extremely damaging, the need for a limiting instruction is apparent, and the failure to give it results in substantial prejudice to the rights of the accused." *Id.*

Our review of the record convinces us that the "fundamental error" rule of *State v. Reece, supra,* is not applicable to this case. An important factor for the *Reece* court was the fact that the prior inconsistent statements used to impeach were so damaging that the failure to give a

limiting instruction, in essence, allowed the jury to consider the impeachment evidence as substantive evidence, and thereby allowed inadmissible hearsay evidence to take precedence over testimony given under oath by the witness on the stand. In this case, the testimony about the defendant's other crimes was relevant to his guilt, and no hearsay problems were involved.

Accordingly, although there is a significant possibility of misuse with testimony about a defendant's commission of other crimes, and limiting instructions are critical in preventing the improper and prejudicial use of proof of other crimes, *see, e.g., State v. Fisher,* 670 S.W.2d 232, 237 (Tenn. Crim. App. 1983), we conclude that the trial court did not commit reversible error in failing to give limiting instructions with respect to the proof of other crimes. The defendant waived the issue by not requesting a limiting instruction and by not raising the issue in his motion for a new trial, Tenn. R. App. P. 3(e), and the failure to give limiting instructions was neither fundamental nor prejudicial error. *State v. West,* 767 S.W.2d 387, 396 (Tenn. 1989). In this case, the blame for the failure to give limiting instructions "must be laid at the defendant's feet." *Laird v. State,* 565 S.W.2d 38, 40 (Tenn. Crim. App. 1979).

H. Conclusion

This completes our review of the defendant's contentions with respect to alleged trial court errors in the guilt phase. We find that no reversible error occurred during the guilt phase and, accordingly, we affirm the defendant's guilt.

PART II.

SENTENCING PHASE

A. Recantation of Preliminary Hearing Testimony

During the sentencing phase, as in the guilt phase, the defendant sought to introduce testimony from Watson's Oklahoma attorney, and the defendant's Oklahoma attorney, that Watson said she lied during the preliminary hearing in order to escape the death penalty herself. The trial court, however, sustained the State's objection to the testimony on the grounds of relevance and hearsay, finding that the evidence did not go to mitigation, but instead was an attempt to re-litigate the innocence of the defendant.

The defendant contends that the trial court's ruling was erroneous because the evidence went to the statutory mitigating circumstance that "[t]he defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor." Tenn. Code Ann. § 39-2-203(j)(5) (1982). In addition, the defendant argues that the trial court's exclusion of this evidence violated his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution. We disagree.

Under the Eighth Amendment, which is applicable to the states through the Fourteenth Amendment, *see Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), after restricting the class of death-eligible offenses, a state must utilize additional procedures that assure reliability in the determination that death is the

appropriate punishment in a given capital case. *See Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). To meet this reliability requirement, a state must permit the sentencer to make an individualized determination on the basis of the character of the individual and the circumstances of the crime. *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235, 251 (1983). Thus, the defendant is entitled to present and have the sentencer fully consider all relevant evidence in mitigation of the sentence. *Skipper v. South Carolina*, 476, U.S. 1, 4, 106 S.Ct. 1669, 1670-71, 90 L.Ed.2d 1, 6 (1986).

We conclude that it was not error to exclude the evidence that Watson later recanted to her lawyers the preliminary hearing testimony in which she identified Howell as the triggerman. The evidence is overwhelming that the defendant was the person who killed Alvin Kennedy, and he had implicitly admitted it to a witness. There is absolutely no proof in the record that Watson was the killer. We find that the evidence of Watson's recantation was irrelevant to the mitigating circumstance set out in Tenn. Code Ann. § 39-2-203(j)(5) (1982) and to the defendant's character or the circumstances of the crime.

B. State's Cross-Examination of Dr. Murphy

The defendant next contends that prejudicial error was committed by the state in the manner in which it used a study to cross-examine Dr. Murphy. On direct examination, Dr. Murphy testified that the tests given the defendant, the result of which showed "definite evidence

of brain damage," were very reliable and not susceptible to attempts at malingering or faking by the defendant. On cross-examination, the State asked Murphy, over objection, if he was familiar with the Faust, Hart and Gilmecki study conducted in 1987 in which children had been instructed to fake neuropsychological exams and the results were then sent to qualified experts, such as Murphy for evaluation. Dr. Murphy replied that he was not familiar with the study. The State then proceeded to ask Murphy, over objection, if he would be surprised that 93% of the neuropsychologists had found the tests abnormal "when, in fact, none of them were." Dr. Murphy then explained the limitations of such studies, but conceded that the professional literature in general indicates that psychological tests are sometimes inaccurate and can be faked.

The defendant contends that this line of cross-examination was error because the authoritative nature of the study was not acknowledged by Murphy or established by independent evidence as required by *McCay v. Mitchell*, 62 Tenn. App. 424, 463 S.W.2d 710, 720 (1970).[6]

The State, in response argues that any error was harmless because the jury was instructed that statements, arguments, and remarks of counsel are not evidence and should be disregarded if not supported by the evidence, and because Murphy conceded that although he was not familiar with this particular study, he was aware of other

[6] Impeachment of an expert by learned treatises is now governed by Rule 618 of the Tennessee Rules of Evidence which restates the holding of *McCay v. Mitchell, supra*. *See* Advisory Commission Comments.

professional literature indicating that psychological tests are sometimes inaccurate and can be faked. We agree.

Requiring proof of the authoritative nature of the study has the "wholesome effect of not permitting this issue to be determined by mere statements of counsel." *Id.* Here, Dr. Murphy, although he was not familiar with the specific study used by the State, conceded that there is authoritative literature in his field of expertise which indicates that psychological tests are sometimes inaccurate and can be faked. In this context, we conclude that the failure to establish by independent evidence the authoritative nature of the Faust, Hart and Gilmecki study was harmless error.

C. The Trial Judge's Statement During Sentencing

The defendant next argues that the trial judge's comment to his counsel, "Mr. Jones, I have ruled, it's a matter for the appellate courts," in connection with the objection to the State's use of the Faust, Hart and Gilmecki study, diminished the jury's sense of responsibility for imposing the death penalty and implied the jury's decision was not final in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). We disagree.

Caldwell involved a prosecutor's misleading argument, endorsed by the trial judge, that a jury's death sentence was not final but reviewable on appeal. The statement of the trial court in this case concerned an evidentiary ruling and was directed to the defendant's counsel, not the jury. The asserted *Caldwell* violation is

without merit. *See Johnson v. State*, 797 S.W.2d 578 (Tenn. 1990); *State v. Taylor*, 771 S.W.2d 387, 396 (Tenn. 1989).

D. Sympathy Instruction and Argument

Next the defendant argues that the trial court's "anti-sympathy" instruction given at the sentencing and guilt phase of the trial violated his rights under the Eighth Amendment. This issue is without merit. *See State v. Smith*, 857 S.W.2d 1, 21 (Tenn. 1993); *State v. Boyd*, 797 S.W.2d 589, 598 (Tenn. 1990).

The defendant also contends that the trial court's refusal to charge the jury, as requested by the defendant, that "you are allowed to consider sympathy elicited based on evidence presented," violated the Eighth Amendment requirement that a jury be allowed to consider any mitigating evidence. The trial court instructed the jury that they were "authorized to weigh and consider any mitigating circumstances . . . raised by the evidence throughout the entire course of the trial," and in addition to informing them of the statutory mitigating circumstances, instructed them that they were to consider "any aspect of the defendant's character or record or any circumstances of the offense favorable to the defendant shown by the proof." The jury was not precluded from considering mitigating evidence by the charge given. The issue is without merit. *See Edward v. State*, 540 S.W.2d 641, 649 (Tenn. 1976); *cf. Smith*, 857 S.W.2d at 22 (instruction on mercy); *Melson*, 638 S.W.2d at 366 (instruction on mercy).

Finally, the defendant contends that the prosecutor's closing argument at the sentencing hearing requesting that the jury not feel sorry for the defendant because of his head injuries and telling them to overcome their sympathy for the defendant violated the Eighth Amendment. Examination of this argument in context reveals that the prosecutor was urging the jury not to return a life sentence based on the mitigating circumstances presented by the defendant. Such argument is proper. This issue has no merit.

E. Constitutionality of the Death Penalty

The defendant first asserts that the death penalty is cruel and unusual punishment. Relying on the dissenting opinion in *State v. Dicks*, 615 S.W.2d 126, 132 (Tenn. 1981) (Brock, C.J., dissenting), the defendant contends that under all circumstances, the death penalty is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution. We find no merit to this argument, which has been considered and rejected many times by this Court. *State v. Bane*, 853 S.W.2d 483, 489 (Tenn. 1983); *Smith*, 857 S.W.2d at 23; *State v. Black*, 815 S.W.2d 166, 185 (Tenn. 1991); and *State v. McCormick*, 778 S.W.2d 48, 53 (Tenn. 1989).

Next, the defendant argues that the statute under which he was sentenced, particularly Tenn. Code Ann. § 39-2-203(g) (1982), is unconstitutional because it impermissibly places the burden of proof upon the defendant to prove that mitigating circumstances outweigh aggravating circumstances in violation of the dictates of *Mullaney*

v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). We find no merit to this argument because "the statute, taken in context, clearly outlines where the burden of proof lies." *Boyd*, 797 S.W.2d at 596. *See also Bane*, 853 S.W.2d at 488; *Thompson*, 768 S.W.2d at 251-52.

The defendant next contends that the sentencing statute is unconstitutional because it impermissibly interferes with the jury's discretion to decline to impose the death penalty, and thereby creates a "presumption of death." The defendant argues that the language providing that if the aggravating "circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death," Tenn. Code Ann. § 39-2-203(g) (1982), requires a sentence of death when the aggravating and mitigating factors are evenly balanced.

This agreement was addressed and rejected in *State v. Boyd, supra*, where we found that "[t]here is no likelihood that this statutory language imposes a "presumption of death." *Boyd*, 797 S.W.2d at 596. *See also Bane*, 853 S.W.2d at 488; *State v. Wright*, 756 S.W.2d 669, 674 (Tenn. 1988); and *State v. Teague*, 680 S.W.2d 785, 790 (Tenn. 1984). Accordingly, we find no merit to the defendant's argument.

Along the same lines, the defendant argues that "the sentence shall be death" portion of the statutory language quoted above violates Article I, § 19 of the Tennessee Constitution, which requires that "in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases." Howell contends that the "shall" language impermissibly interferes with the jury's absolute discretion to impose its own decision under Article I, § 19.

This argument was addressed and rejected by this Court in *Black, supra*, where we found that the language of Tenn. Code Ann. § 39-2-203(g) (1982) does not violate Article I, § 19, of the Tennessee Constitution. *Id.*, 815 S.W.2d at 186-87; *see also Bane*, 853 S.W.2d at 490. Accordingly, we find no merit to this argument.

Next, the defendant contends that the sentencing statute violates the Eighth and Fourteenth Amendments to the U.S. Constitution because it does not require the jury to find beyond a reasonable doubt that the aggravating circumstances are not outweighed by the mitigating circumstances in order to support a death sentence. Once again, this argument has been addressed and rejected by this court. In *State v. Thompson, supra*, after reviewing the language of Tenn. Code Ann. § 39-2-203 (1982), and the relevant standards under the Eighth Amendment, we concluded that "the phrasing [of the statute] does not operate to preclude consideration of any relevant mitigating factors and that it satisfies the constraints of the eighth amendment." *Thompson*, 768 S.W.2d at 252; *see also Bane*, 853 S.W.2d at 489. Accordingly, we find the defendant's argument to be without merit.

The last argument raised by the defendant attacking the constitutionality of the death penalty is that Tennessee's statute fails to sufficiently narrow the class of death eligible defendants under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution, because all persons convicted of felony murder are eligible for the death penalty on the sole basis that they committed the underlying felony.

In *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), this Court held that it is unconstitutional under the Tennessee Constitution, Article I, Section 16, to use the felony murder aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(7) (1982) [now § 39-2-204(i)(7) (1991)], to support *imposition of* the death penalty *for* a conviction of felony murder, although it *can* be used to support imposition of the death penalty for premeditated murder. We determined that the use of the *felony murder* aggravating circumstance duplicated the elements of the underlying crime and failed to narrow the class of death-eligible murderers as required by Article I, Section 16, of the Tennessee Constitution and by the Eighth Amendment to the United States Constitution.[7] We must now determine whether, based on the facts in this case, the sentencing jury's consideration of the invalid felony murder aggravating circumstance is harmless beyond a reasonable doubt where there is one remaining aggravating circumstance consisting of the defendant's prior violent felony convictions, which were introduced in support of the aggravating circumstance at trial. Evidence of the prior violent felony convictions included: a 1984 Wyoming conviction for armed robbery; a 1988 Oklahoma conviction for first-degree murder, for which he received the death

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[7] The decision in *Middlebrooks* was required by Art. I, § 16 of the Tennessee Constitution. We reviewed federal constitutional law in our analysis to determine whether the duplication also violated the Eighth Amendment to the United States Constitution, but *Middlebrooks* was decided on separate and independent state constitutional grounds. *See Middlebrooks*, 840 S.W.2d at 346; *Zant v. Stephens*, 462 U.S. at 877, 103 S.Ct. at 2742.

penalty; a 1988 Florida conviction for attempted murder; and a 1988 Florida conviction for armed robbery.

In *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), the U.S. Supreme Court first applied the *Chapman, supra*, harmless error analysis to federal constitutional errors occurring in capital sentencing proceedings. *Id.*, 486 U.S. at 261, 108 S.Ct. at 1800. In that case, the constitutional error – admission of evidence in violation of the defendant's Sixth Amendment right to consult with counsel before submitting to a psychiatric examination designed to determine future dangerousness[8] – was not held to be harmless.

Two years later, in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the Court held that when a sentencing jury in a weighing state has relied, in part, on a constitutionally invalid aggravating circumstance, state appellate courts may reweigh the remaining aggravating circumstances against the mitigating evidence, if permissible under state law, or apply *Chapman* harmless error analysis. The majority in *Clemons* held that a reviewing Court is capable of examining the balance struck by the sentencing authority, be it judge or jury, and of deciding whether the elimination of an improperly considered aggravating circumstance affected the balance, without denying an individualized determination on the basis of the character of the individual and the circumstances of the crime. *Clemons*, 494 U.S. at 758, 110 S.Ct. at 1450 (quoting *Barclay v. Florida*, 463 U.S.

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[8] *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), a case in which the plurality found that the Florida Supreme Court could apply harmless error analysis when reviewing a death sentence imposed by a trial judge who, as a matter of state law, erroneously considered a nonstatutory aggravating circumstance).

The *Clemons* majority did not consider written jury findings concerning mitigating circumstances necessary for effective appellate reweighing or harmless error analysis, but instead commented:

> Nor are we impressed with the claim that without written jury findings concerning mitigating circumstances appellate courts cannot perform their proper role. In *Fonzeo* and *Proffitt*, we upheld the Florida death penalty scheme permitting a trial judge to override a jury's recommendation of life, even though there were no written jury findings. An appellate court also is able adequately to evaluate any evidence relating to mitigating factors without the assistance of written jury findings.

Clemons, 494 U.S. at 756, 110 S.Ct. at 1449.

In a more recent case, *Stringer v. Black*, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), the Court stated that as applied to a capital sentencing jury's consideration of an invalid aggravating factor, the *Chapman* harmless error standard requires that an appellate court conclude, beyond a reasonable doubt, that the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating factor. *Id.*, ___ U.S. at ___, 112 S.Ct. at 1137. A lesser requirement would

deprive the defendant of the precision that individualized consideration demands. *Id.* Moreover, "the bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." *Sochor v. Florida*, ___ U.S. ___, ___, 112 S.Ct. 2114, 2123, 119 L.Ed.2d 326 (1992) (O'Connor, J. concurring).

This Court, prior to *Clemons*, concluded that a sentencing jury's consideration of an invalid aggravating circumstance was subject to harmless error analysis. In *State v. Bobo*, 727 S.W.2d 945 (Tenn. 1987), the State committed error by introducing evidence of another murder for which the defendant had not been convicted to establish the aggravating circumstances of mass murder. We concluded that the error was harmless beyond a reasonable doubt, because the record fully supported two other valid aggravators, and contained little evidence of mitigating circumstances.

Again, in *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984), four aggravating circumstances were found by the jury; however, this Court found the evidence insufficient to support one of the aggravators, but concluded that the error was harmless beyond a reasonable doubt because the evidence clearly established the remaining three aggravators found by the jury. *See also State v. Workman*, 667 S.W.2d 444 (Tenn. 1984) (error in admitting opinion evidence on an ultimate issue, specifically the presence of a statutory aggravating circumstance, was harmless beyond a reasonable doubt because there was overwhelming evidence of the other four remaining aggravating circumstances and a paucity of evidence of mitigating circumstances); *State v. Campbell*, 664 S.W.2d

281 (Tenn. 1984) (error in admitting evidence of convictions for non-violent felonies in order to establish aggravating circumstance of prior violent felony convictions was harmless beyond a reasonable doubt because evidence of prior violent felony convictions was introduced to support the aggravator, the evidence supporting the two other aggravating circumstances was overwhelming, and there was no evidence of mitigating circumstances).[9]

In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.[10]

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[9] Since *Clemons*, we have reviewed a number of capital cases in which an invalid or unconstitutional aggravating circumstance was considered by the sentencing jury, but have been unable to conclude that the error was harmless. *See, e.g., Bane*, 853 S.W.2d at 489; *Smith*, 857 S.W.2d at 25; *State v. Evans*, 838 S.W.2d 185, 196 (Tenn. 1992); *Middlebrooks*, 840 S.W.2d at 322; *State v. Terry*, 813 S.W.2d 420 (Tenn. 1991).

[10] Other jurisdictions consider similar factors in conducting harmless error analysis. *See People v. Sanders*, 797 P.2d 561 (Cal. 1990) (jury's consideration of invalid special circumstances did not prejudice the defendant because the prosecutor did not emphasize those factors in his argument to the jury); *Preston v. State*, 564 So. 2d 120 (Fla. 1990) (court could not conclude that

When examining the first of these factors, we necessarily consider the number of remaining valid aggravating circumstances since the effect of aggravating circumstances on sentencing usually increases with the number of circumstances proven; but even more crucial than the sum of the remaining aggravating circumstances is the qualitative nature of each circumstance, its substance and persuasiveness, as well as the quantum of proof supporting it. In that respect, the Tennessee statute assigns no relative importance to the various statutory aggravating circumstances. By their very nature, and under the proof in certain cases, however, some aggravating circumstances may be more qualitatively persuasive and objectively reliable than others. That is particularly true of the aggravating circumstance remaining in this case. Tenn. Code Ann. § 39-2-203(i)(2) (1982) (previous convictions of felonies involving the use of violence to the person). In addition, as the present case illustrates, the effect of the aggravating circumstance on the sentence may increase where there is proof of more than one prior violent felony conviction.

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the jury's consideration of an invalid aggravating circumstance was harmless error because prosecutor emphasized the importance of the invalid circumstance in his closing argument, and only two valid aggravating circumstances remained); *Shell v. State*, 595 So.2d 1323 (Miss. 1992) (court could not conclude jury's consideration of invalid aggravating circumstance harmless because it was argued almost exclusively to the jury and only one valid aggravator remained); *Beets v. State*, 821 P.2d 1044 (Nev. 1991) (court concluded that the jury's consideration of two invalid aggravating circumstances was harmless beyond a reasonable doubt because there were three other valid aggravators and no mitigating evidence).

The second factor, the extent to which the prosecutor emphasizes the invalid aggravating factor during closing argument, is relevant to the harmless error analysis. However, unlike other state courts[11], we do not consider it the prime factor in the determination of whether the error was harmless beyond a reasonable doubt. The emphasis on the invalid circumstance during argument is but one of several considerations in our analysis.

The third significant factor in harmless error analysis is whether an invalid aggravating circumstance was established by evidence that was materially inaccurate or admissible only to support the invalid aggravator, or whether the evidence was otherwise admissible in either the guilt or sentencing phases of the proceeding. *Clemons*, 49 U.S. at 758, n.5, 110 S.Ct. at 1451, n.5. In evaluating a jury's consideration of an invalid aggravating factor, it is important to ask whether removal of that factor from the sentencer's consideration also removes any evidence from the jury's total consideration, or whether the State's reliance on the invalid circumstance allowed the jury to improperly consider any evidence. Even though the jury cannot weigh the invalid aggravating factor against any mitigating factors, the jury can properly consider evidence of the circumstances of the crime and the character of the defendant in making an individualized determination of whether the death sentence is justified. *Id.* In that respect, an aggravating factor which duplicates the elements of the underlying crime has less relative tendency to prejudicially effect the sentence imposed than invalid

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[11] *See People v. Sanders*, 797 P.2d 561 (Cal. 1990); and other cases cited *supra* at note 10.

aggravating factors which interject inadmissible evidence into the sentencing calculus, or which require the sentencing jury to draw additional conclusions from the guilt phase evidence.[12]

Finally, all the relevant evidence in mitigation must be fully considered in applying harmless error analysis to guarantee that the defendant receives an individualized sentencing determination. *Stringer*, ___ U.S. at ___, 112 S.Ct. at 1137. As in the case of the remaining valid statutory aggravating circumstance, we examine both the quantum and quality of the mitigating factors presented by the proof.

In the present case, the evidence supporting the remaining aggravating factor of prior violent felony convictions is undisputed and overwhelming. In addition to the cold-blooded execution-style murder of Kennedy in Memphis, Tennessee, the defendant committed another similar cold-blooded execution-style murder in Oklahoma within twenty-four hours of Kennedy's murder. Less than thirty days later, he committed an armed robbery in Florida and later engaged in a shoot-out with police officers before his capture, for which he was convicted of attempted murder. A few years earlier, he had been convicted in Wyoming for armed robbery. Moreover, the prosecutor's argument strongly emphasized the defendant's violent felony convictions, with little

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[12] *But see State v. Campbell, supra*, in which improper evidence was admitted to support the invalid aggravating circumstance, yet the error was harmless beyond a reasonable doubt based on the record in that case.

emphasis on the armed robbery. Furthermore, no additional evidence, nor any evidence that was not already properly before the jury, was introduced in support of the invalid aggravating circumstance. Finally, the mitigating evidence in this case focused on environmental conditions in childhood and psychological testing which was interpreted to demonstrate brain damage. This, in turn, according to the psychologist, impaired the defendant's judgment and ability to appreciate his conduct was wrong. Extensive medical testing, however, failed to show the claimed brain damage. There was virtually no mitigating evidence relating to the good character of the defendant, other than the evidence offered to explain his antisocial behavior.

After a careful review of the record, we conclude beyond a reasonable doubt that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor, and we affirm the sentence of death.

CONCLUSION

We have carefully considered the defendant's contentions as to the alleged errors occurring during the guilt and sentencing phases and conclude the defendant's conviction and death sentence should be affirmed.

In accordance with the mandate of Tenn. Code Ann. § 39-2-205(c)(4)(D) (1982) [now Tenn. Code Ann. § 39-13-206(c)(1)(D) (1991)], we find that the sentence of death was not imposed in an arbitrary fashion, that the evidence overwhelmingly supports the jury's finding of

the statutory aggravating circumstance, and that the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance. Further, our comparative proportionality review reveals that the sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and character of the defendant. *See State v. Boyd*, 797 S.W.2d 589 (Tenn. 1990); *State v. Johnson*, 762 S.W.2d 110 (Tenn. 1988); *State v. Bobo*, 727 S.W.2d 945 (Tenn. 1987); *State v. King*, 694 S.W.2d 941 (Tenn. 1985); *State v. McKay*, 680 S.W.2d 447 (Tenn. 1985); *State v. Harries*, 657 S.W.2d 414 (Tenn. 1983); and *State v. Simon*, 635 S.W.2d 498 (Tenn. 1982).

We, therefore, affirm the conviction of first-degree felony murder and the sentence of death. The sentence will be carried out as provided by law on the 10th day of February, 1994, unless otherwise ordered by this Court or by other proper authority. Costs of this appeal are assessed against the defendant, Michael Wayne Howell.

/s/ Riley Anderson
RILEY ANDERSON, Justice

Concur:

Reid, C.J. (see separate Concurring Opinion)
Drowota and O'Brien, JJ.
Daughtrey, J., Concurring in the results only

THE STATE OF TENNESSEE

I, SUE R. WALKER, Chief Deputy Clerk of the Supreme Court of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the

Opinion

.....

Pronounced by said Court at its April Term, 1993, in the case of .....

STATE OF TENNESSEE

.....

.....against .....

MICHAEL WAYNE HOWELL

.....

.....

as appears of record not on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the City of Jackson, on this, the 10th day of November A.D., 1993

/s/ Sue R. Walker
CHIEF DEPUTY CLERK

By _____D.C.

FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE, Plaintiff-Appellee, v. MICHAEL HOWELL, Defendant-Appellant.	(((((((	Shelby Criminal Hon. Joseph B. McCartie, Judge S.C. No. 1 FILED NOV 10 1993

CONCURRING OPINION

I concur in affirming the conviction of first degree murder and the sentence of death.

Since September 1, 1990, the Court has reviewed on direct appeal 13 cases in which the sentence was death.[1] I stated in dissent in *State v. Black*, 815 S.W.2d 166 (Tenn. 1991), the first case on which I sat in which the sentence of death was affirmed, that whether the imposition of death is cruel and unusual punishment in violation of Article I, Section 16 of the Tennessee Constitution should be reserved until the Court is presented a case in which

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[1] *State v. Tran*, ___ S.W.2d ___ (Tenn. 1993); *State v. Hurley*, ___ S.W. 2d ___ (Tenn. 1993); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993); *State v. Branam*, 855 S.W.2d 563 (Tenn. 1993); *State v. Caughron*, 855 S.W.2d 526 (Tenn. 1993); *State v. Bane*, 853 S.W.2d 483 (Tenn. 1993); *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992); *State v. Hale*, 840 S.W.2d 307 (Tenn. 1992); *State v. Harris*, 839 S.W.2d 54 (Tenn. 1992); *State v. Evans*, 838 S.W.2d 185 (Tenn. 1992); *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992); *State v. Black*, 815 S.W.2d 166 (Tenn. 1991); *State v. Terry*, 813 S.W.2d 420 (Tenn. 1991).

there are no errors requiring reversal of the conviction or sentence. The case before the Court is the first in which I have participated that is, in my opinion, sufficiently free of error to require consideration of that basic issue.

The District Attorney General and counsel for the defendant obviously were well-prepared for trial; the prosecution presented the case in a forceful but fair and dignified manner. The lawyers for the defendant put the State to its proof on every issue and utilized every apparent opportunity for the benefit of the defendant. The trial judge demonstrated the qualities critically important in conducting a highly emotional and legally exacting trial. The record shows that the case was decided by a competent and impartial jury. The record demonstrates that capital cases can be tried relatively free of error.

I concur in the decision to affirm the sentence, not because Tennessee death penalty law, in my opinion, now meets constitutional standards, but because the procedures followed and the facts proven in this case satisfy the essentials of a constitutionally valid system. I write separately to discuss the constitutionality of the death penalty and, in the context of this case, deficiencies in Tennessee's death penalty jurisprudence.

CONSTITUTIONALITY OF DEATH PENALTY

In a non-capital case, *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958), the United States Supreme Court discussed the history and scope of the rights protected by the constitutional provision against cruel and unusual punishment:

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Court recognized in [*Weems v. United States*, 217 U.S. 349 (1909)] that the words of the Amendment are not precise, and that their scope is not static. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

In *Gregg v. Georgia*, 428 U.S. 153, 171-173 (1976), the Supreme Court expanded upon the requirements of the Eighth Amendment of the United States Constitution:

> Thus the clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." [*Weems v. United States*, 217 U.S. at 378]. . . .
>
> . . . .
>
> It is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the

progress of a maturing society." *Trop v. Dulles*, [356 U.S. at 101]. See also *Jackson v. Bishop*, 404 F.2d 571, 579 (CA 8 1968). Cf. *Robinson v. California*, [370 U.S. 660, 666 (1962)]. Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. As we develop below more fully, see *infra*, at 2926-2927, this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop v. Dulles*, [356 U.S. at 100] (plurality opinion). This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. *Furman v. Georgia*, [408 U.S. 238, 392-93 (1972)] (Burger, C. J., dissenting). See *Wilkerson v. Utah*, [99 U.S. 130, 136 (1878); *Weems v. United States*, [217 U.S. at 381]. Second, the punishment must not be grossly out of proportion to the severity of the crime. *Trop v. Dulles*, [356 U.S. at 100] (plurality opinion) (dictum); *Weems v. United States*, [217 U.S. at 367].

In *Gregg v. Georgia*, the Supreme Court, rejected the contention that, though historically the death penalty had been the law in every state and was, at least implicitly, recognized by the language of the Eighth Amendment, contemporary society had in 1976 rejected the death penalty as an appropriate and necessary criminal sanction. The Supreme Court concluded that "in the absence of more convincing evidence, . . . death as a punishment for murder is not without justification and thus is not unconstitutionally severe." 428 U.S. at 187.

Consequently, under the federal constitution, when properly made an issue by the pleadings and proof, the determination of whether capital punishment constitutes cruel and unusual punishment requires an assessment of contemporary values in Tennessee concerning the imposition of the penalty of death for a particular offense. That assessment cannot be subjective but must include the consideration of objective indicia which reflect the public attitude. However, public attitude is not conclusive; the assessment must also be consistent with human dignity and must include a finding that capital punishment for the particular offense accomplishes some beneficial social purpose. A similar analysis must be performed under the state constitution, even if this Court should find that the standard for determining whether capital punishment is cruel and unusual is higher than that required by the federal constitution. *See State v. Black*, 815 S.W.2d 166, 189 (Tenn. 1991). In both cases, there are factual issues that can be resolved only by proof. Since these issues are not addressed by the pleadings or proof in this case, there is no basis on which this Court can make an assessment of

contemporary values in Tennessee under the United States Constitution or the Tennessee Constitution.

DEFICIENCIES IN DEATH PENALTY JURISPRUDENCE

Under state and federal law, this Court bears the responsibility for the development and imposition of a system of death penalty jurisprudence which meets all constitutional and statutory requirements. My view as to the duty of the Court in this regard was set forth in *State v. Black:*

> Under these circumstances, particularly in light of the nature of the punishment, the imperfection of the judicial system, and the broad discretion vested in the district attorneys general of this State, *see State v. Dicks*, [615 S.W.2d 126, 136, 140-141 (Tenn. 1981)], this Court should assert its full and independent authority under the State Constitution to assure that the process whereby a defendant is sentenced to death is essentially free of error. This Court, through the exercise of strict appellate review, must require stringent and exact compliance with the Tennessee Constitution and state statutes. The United states Supreme Court has repeatedly emphasized the importance of meaningful appellate review to protect against the unlawful imposition of the death penalty. *See Zant v. Stephens*, [462 U.S. 862, 876 (1983)]; *Barclay v. Florida*, [463 U.S. 939, 973 (1983)] (Stevens, J., concurring) ("the question is whether, in its regular practice, the Florida Supreme Court has become a rubber stamp for lower court death-penalty determinations.").

815 S.W.2d at 194-95. Since *State v. Black*, the Court has addressed some of the more significant deficiencies in Tennessee death penalty law. Some have been resolved, but, in my view, others have been ignored or treated superficially.

Review of a sentence of death involves, in addition to the assignments of error made by the parties, the examination by the Court of three critical aspects of the case. *See State v. Middlebrooks*, 840 S.W.2d 317, 351 (1992), (Reid, C.J., concurring and dissenting). The first step is the determination that the sentence of death is not disproportionate to the crime committed, thereby establishing the defendant as a member of the death-eligible class of offenders. *Id.* The second step is the determination of whether the narrowing process has shown the defendant is among the worst of the death-eligible class. *Id.* at 351-52. The third step is a comparative proportionality review whereby the Court finds, upon consideration of the defendant and the offense, that the sentence of death is not disproportionate to the penalties imposed in similar cases. *Id.* at 354-55. Proportionality, as a measure of fairness, is the principle guiding the Court's review. First, the sentence of death is compared with the offense committed; then, the defendant is compared with other death-eligible offenders; and, last, the defendant and the criminal acts on which the sentence is based are compared with other similar offenders and acts committed. This process helps achieve a " 'reasoned *moral* response to the defendant's background, character, and crime,' " *see Penry v. Lynaugh*, 492 U.S. 302, 318, 109 S. Ct. 2934, 2947 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)),

and is designed to select for execution only those most deserving of death, the worst of the bad.

DEFINING THE DEATH-ELIGIBLE CLASS

Review of a case in which the defendant has been sentenced to death logically begins with the definition of the class of death-eligible defendants under the United States Constitution. Under the Eighth and Fourteenth Amendments, death is a disproportionate punishment in all cases except where a defendant kills, attempts to kill, or intends that a killing take place, or that lethal force will be imposed, or where a defendant's personal involvement in the underlying felony is substantial and who exhibits a reckless disregard or indifference to the value of human life. *Tison v. Arizona*, 481 U.S. 137, 157-158 (1987); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *State v. Branam*, 855 S.W.2d 563, 570-71 (Tenn. 1993); *State v. Middlebrooks*, 840 S.W.2d 317, 338 (Tenn. 1992).

Superimposed upon this defined group of defendants are additional constitutional and statutory limitations. The federal constitution does not permit all murderers in this death-eligible class to be executed. The process fashioned by the United States Supreme Court for selecting those who ultimately will be executed was summarized in *State v. Middelbrooks* as follows:

> As a constitutionally necessary first step under the Eighth Amendment, the Supreme Court has required the states to narrow the sentencers' consideration of the death penalty to a smaller more culpable class of homicide defendants than the pre-*Furman* class of death-eligible murderers. *See Pulley v. Harris*, [465 U.S. 37

> (1984)]. A state, however, must not only genuinely narrow the class of death eligible defendants, but must do so in a way that reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Zant v. Stephens*, [462 U.S. at 877]. A proper narrowing device, therefore, provides a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not, *Godfrey v. Georgia*, [446 U.S. 420, 433 (1980)], and must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed. *Zant* [462 U.S. at 879]. As a result, a proper narrowing device insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers – those whose crimes are particularly serious, or for which the death penalty is peculiarly appropriate. *See Gregg v. Georgia*, [428 U.S. 153 (1976)].

840 S.W.2d at 343. Thus, this Court has recognized that the United States Constitution defines the class of death-eligible defendants but also requires further narrowing by statute or court review.

The state of Tennessee has by constitution and statute further limited those who are death-eligible. As noted in the dissent in *State v. Black*:

> Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards and do not relegate Tennessee citizens to the lowest levels

of constitutional protection, those guaranteed by the national constitution.

Indeed, the General Assembly has clearly indicated that when a defendant's life is at stake, citizens of Tennessee are entitled to greater protections than those guaranteed by the United States Constitution. Recognizing higher standards than the United States Supreme Court has found in the federal constitution and reflecting a higher "contemporary standard of decency" in Tennessee, the legislature has forbidden the execution of persons who are under the age of eighteen, T.C.A. § 37-1-134(a)(1), and who are mentally retarded, T.C.A. § 39-13-203. *Compare Stanford v. Kentucky,* [492 U.S. 361 (1989)] (Eighth Amendment is not violated by imposition of death in sixteen and seventeen year olds); *Penry v. Lynaugh,* [492 U.S. 302 (1989)] (Eighth Amendment does not prohibit subjecting mentally retarded defendant to death penalty).

815 S.W.2d at 193.

The Court, since *Black,* has also narrowed the group of death-eligible defendants by finding death to be a disproportionate penalty. In *State v. Branam,* 855 S.W.2d 563 (Tenn. 1993), the Court found in a unanimous decision that, under the circumstances of that case, death was disproportionate punishment for an accomplice who was not the trigger-man in a felony murder. The Court found in *State v. Hale,* 840 S.W.2d 307 (Tenn. 1992), that death was disproportionate punishment for misdemeanor child abuse causing the death of the child.

The most significant decision by the Court was *State v. Middlebrooks* 840 S.W.2d 317 (Tenn. 1992), which

addressed the use of aggravating circumstances to narrow the death-eligible class to those defendants for whom imposition of the death penalty is most appropriate. In *Middelbrooks* the Court held that because the felony murder aggravating circumstance, T.C.A. § 39-2-203(i)(7) (1982) [now 39-13-204(i)(7) (Supp. 1993)], essentially duplicated the elements of the offense of first degree felony murder, T.C.A. § 39-2-202(a) (1982) and T.C.A. § 39-2-202(a)(1) (Supp. 1988), it failed to narrow the population of death-eligible felony murder defendants as required by the Eighth Amendment and Article I, Section 16. *Middelbrooks,* by eliminating felony murder as an aggravating circumstance in first-degree felony murder prosecutions, has accomplished two significant results. It adds a new category of defendants who are immune from the imposition of the sentence of death in those cases where defendants are charged with first-degree felony murder and the only aggravating circumstance is the felony' and, it eliminates felony murder as an aggravating circumstance in selecting those death-eligible defendants who are most deserving of the sentence of death in those cases where other aggravating circumstances are present.

However, *Middlebrooks* accomplished only a partial solution. My concurrence and dissent in that case stated:

> This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a "demonstrably smaller and more blameworthy" class of murderers. *Maynard v. Cartwright,* [486 U.S. 356 (1988)]. However, even with the felony murder aggravating

> circumstance eliminated, the Tennessee sentencing statute still includes in the class of death-eligible defendants accidental and unintentional murderers whose culpability is minimal. It still allows convictions for first degree felony murder of persons who killed accidentally or unintentionally and those who did not kill, did not intend to kill and did not intend that any person suffer any physical harm. The statute still does not effectively limit the class of *death-eligible* defendants (which is a group different from those actually executed) to those most deserving of death as punishment and, therefore, it violates the Tennessee constitutional prohibition against cruel and unusual punishment.

840 S.W.2d at 350 (Reid, C.J., concurring and dissenting). I further criticized the majority's reasoning because:

> The result . . . is illogical: an aggravating circumstance that fails to narrow the class because it duplicates the elements of the offense is unconstitutional, but aggravating circumstances that fail to narrow the class for other reasons are not unconstitutional. The logical conclusion from the majority Opinion's analysis would be that any provision of the statute that fails to accomplish the constitutional imperative to narrow the class is invalid.

Id. at 352.

On the authority of *Middlebrooks*, the Court subsequently reversed the sentence of death and remanded for resentencing in *State v. Bane*, 853 S.W.2d 483 (Tenn. 1993), in which the aggravating circumstances found by the jury were T.C.A. § 39-13-204(i)(5), the murder was especially heinous, atrocious or cruel, and (i)(7), felony murder;

State v. Evans, 838 S.W.2d 185 (Tenn. 1992), in which the aggravating circumstances were (i)(6), the murder was committed to avoid lawful arrest and (i)(7) felony murder; and *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993), in which the aggravating circumstances were (i)(2), previous felony convictions, and (i)(7), felony murder. The defendant in *Smith* was not, in my view, death-eligible, because the record did not show that the killing was deliberate or intentional or accompanied by a conscious purpose of producing death or a conscious realization that death likely would occur. *See Middlebrooks*, 840 S.W.2d at 353.

In summary, the federal constitution allows the prosecution to seek a sentence of death for any defendant who himself kills, attempts to kill, or intends that a killing takes place or that lethal force will be imposed, or for any defendant whose personal involvement in the underlying felony is substantial and who exhibits a reckless disregard or indifference to the value of human life. However, T.C.A. § 39-13-203 prohibits the imposition of death upon any mentally retarded person; T.C.A. § 37-1-134(a)(1)(A) prohibits the imposition of death upon any person less than 18 years of age; *State v. Branam*, 844 S.W.2d at 570, raises the level of participation required of a defendant who did not personally wield the lethal agent and may be read to exclude such persons from the death-eligible group; and *State v. Hale*, 840 S.W.2d at 314, excludes any person who caused the death of another by the commission of an act which is not a felony. *Middlebrooks* excludes any person charged with felony murder and not charged with some aggravating circumstance other than T.C.A. § 39-13-204 (i)(7), felony murder.

Nevertheless, the class still includes some defendants who killed accidentally or unintentionally and those who did not kill, did not intend to kill, and did not intend that any person suffer physical harm. I would limit the felony murderers eligible for the imposition of the death penalty to those defendants in cases, like the present, in which the proof shows the killing was deliberate or intentional or accompanied by a conscious purpose of producing death or a conscious realization that death will likely occur.

The record in this case shows the defendant is a member of the death-eligible class under both the federal and state constitutions. The defendant's own statement shows the killing was deliberate or intentional.

USE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES TO ACCOMPLISH PARTICULARIZED SENTENCING

At the second stage of the death penalty procedure, at which the jury is required to consider aggravating and mitigating circumstances in order to achieve particularized sentencing, the Court has not given sufficient guidance in the use of aggravating and mitigating circumstances. The Court has, instead, it seems to me, searched for some basis on which to affirm the sentence of death despite a misuse of aggravating circumstances, most often by a finding of harmless error.

This constitutionally mandated function is accomplished by requiring the jury to find beyond a reasonable doubt the existence of one or more statutory aggravating circumstances and that, beyond a reasonable doubt, the

aggravating circumstances outweigh any mitigating circumstances. T.C.A. § 39-13-204(g). Implicit in this exercise is the rational consideration of the substance of each aggravating and mitigating circumstance and an understanding of their practical use in accomplishing the stated purpose of determining that the defendant is not only a member of the death eligible class, but also one of the worst of the death eligible class. There should be sufficient evidence to support each aggravating circumstance found. More than one aggravating circumstance should not be based on the same acts of the defendant. *See Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976); *but see also State v. Carter*, 714 S.W.2d 241 (Tenn. 1986). Aggravating circumstances which are factually inconsistent should not be given effect. *See State v. Black*, 815 S.W.2d at 197 (Reid, C.J., concurring and dissenting). The jury should be instructed as to the meaning of each aggravating circumstance so as to aid the jury in its application. *See, e.g., State v. Hines*, 758 S.W.2d 515, 523 (Tenn. 1988); *State v. Williams*, 690 S.W.2d 517, 527, 532 (Tenn. 1985); *State v. Moore*, 614 S.W.2d 348, 350-351 (Tenn. 1981).

The problems often associated with the definition and application of aggravating circumstances are not present in this case, even though one invalid aggravating circumstance was charged. The defendant was charged with aggravating circumstances T.C.A. § 39-13-204(i)(2), having previously been convicted of one or more felonies involving violence to the person; (i)(6), committing the murder to prevent the lawful arrest or prosecution of the defendant; and (i)(7), committing the murder during the course of a felony. The jury found aggravating circumstances (i)(2) and (i)(7). Aggravating circumstance (i)(7)

was found in *State v. Middlebrooks*, 840 S.W.2d at 341-47, to be an invalid aggravating circumstance on the charge of first-degree felony murder, and the case was remanded for re-sentencing. However, the Court has found in this case that charging (i)(7) was harmless error, and has affirmed the sentence of death.

I have indicated previously that harmless error analysis is inappropriate whenever one of the aggravating circumstances found by the jury is found to be invalid on appeal. I still subscribe to that view with regard to the previous cases considered by the Court and in all cases where the Court must make a subjective decision regarding the effect of the aggravating circumstance found to be harmless. However, even though in the present case, the court improperly submitted to the jury the aggravating circumstance of felony murder, T.C.A. § 39-13-204(i)(7), I concur in the majority's finding that *under the circumstances of this case*, this error was harmless beyond a reasonable doubt, and that the sentence would have been the same had the invalid aggravating circumstance not been charged. *Stringer v. Black*, 503 U.S. ___ ___, 112 S.Ct. 1130, 1137 (1992).

The issue on harmless error analysis is whether the Court can conclude that beyond a reasonable doubt the invalid aggravating circumstance did not influence the jury in its determination that the sentence would be death. *Id.* at 1136. The issue is not the extent to which the aggravating and mitigating circumstances were supported by the evidence or whether the aggravating circumstances outweighed the mitigating circumstances. A finding that the evidence in support of the valid aggravating circumstance was overwhelming and the evidence in

mitigation was meager may, and in this case does, support the jury's finding that beyond a reasonable doubt the aggravating circumstance outweighed the mitigating circumstances, but it does not necessarily follow that the jury was not influenced by the invalid aggravating circumstance. And, further, the Court must conclude that admission of the invalid aggravating circumstance was harmless error before it can consider whether the record supports the jury's finding that aggravating circumstances outweighed mitigating circumstances.

In *Middlebrooks*, the Court found that:

> Even though the evidence amply supports the aggravating circumstance of the murder being especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn.Code Ann. § 39-2-203(i)(5) (1982), we are unable to conclude that the elimination of the aggravating circumstance (i)(7) is harmless error beyond a reasonable doubt.

840 S.W.2 at 347. The dissent in *Middlebrooks* emphasized that:

> This torture-murder of a kidnapped child unquestionably is one of the most aggravated killings that this Court has seen. The fourteen-year-old victim's ordeal, as described in the majority opinion, began at 7:30 p.m. and ended at ll p.m. This brutal and tragic murder is certainly one of the "worst of the bad."

Id. at 350 (Drowota, J. concurring and dissenting). However, there was no insistence in the dissent that the admission of aggravating circumstance (i)(7), if error, was harmless error.

The main opinion undertakes a "principled explanation" of its conclusion that admission of the invalid aggravating circumstance was harmless beyond a reasonable doubt. That explanation is that the "quantum and quality" of all relevant evidence in aggravation and mitigation must be examined and fully considered. The problem with this objective and logical procedure is that jurors are not required to be objective or logical in determining the sentence. This Court in *State v. Terry*, 813 S.W.2d 420 (Tenn. 1991), unanimously found that the erroneous instruction of aggravating circumstance (i)(7) was not harmless error beyond a reasonable doubt. The Court stated, quoting *State v. Pritchett*, 621 S.W.2d 127, 139 (Tenn. 1981).

> We have no way of knowing and cannot speculate whether the jury would have imposed the death penalty with one of the two aggravating circumstances withdrawn from their consideration and with the necessity of weighing the one remaining aggravating circumstance against the mitigating circumstances.

State v. Terry, 813 S.W.2d at 425.

The decision of whether a defendant lives or dies "requires a profoundly moral evaluation of the defendant's character and crime," in which the sentencer, by constitutional mandate, "is afforded substantial discretion." *Satterwhite v. Texas*, 486 U.S. 249, 261 (1988) (Marshall, J., dissenting).

> Because of the moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer,

predicting the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise. As the Court recognized in *Caldwell v. Mississippi*, 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed. 2d 231 (1985), "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." In the same vein, an appellate court is ill equipped to evaluate the effect of a constitutional error on a sentencing determination. Such sentencing judgments, even when guided and channeled, are inherently subjective, and the weight a sentencer gives an instruction or a significant piece of evidence that is later determined to violate a defendant's constitutional rights is nowhere apparent in the record. In *McCleskey v. Kemp*, [481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)], the Court acknowledged that "[i]ndividual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable,' " and their collective judgment of the appropriate sentence is marked by an "inherent lack of predictability." *Id.*, 481 U.S., at 311, 107 S.Ct., at 1776-1777, quoting *Peters v. Kiff*, 407 U.S. 493, 503, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972) (opinion of Marshall, J.). The threat of an erroneous harmless-error determination thus looms much larger in the capital sentencing context than elsewhere.

* * *

Harmless-error analysis impinges directly on the reliability of the capital sentencing decision by allowing a court to substitute its judgment of

> what the sentencer would have done in the absence of constitutional error for an actual judgment of the sentencer untainted by constitutional error.

Id. at 262, 263 (Marshall, J., dissenting).

However, even though the Court cannot reasonably discover the impact of erroneously considered material on an essentially subjective decision,[2] a court can conclude beyond a reasonable doubt that there was no evidence before a jury which could influence its decision. It is on this basis that I concur with the finding of harmless error in this case.

The most significant fact in harmless error analysis is whether the error permitted the sentencers to consider evidence that would not otherwise have come before them. *Cf. State v. Harris*, 839 S.W.2d at 54, 83 (Tenn. 1992) (Reid, C.J., dissenting) (evidence of other offenses not properly before jury absent error at guilt phase). In this case, as stated in the main opinion,[3] the jury heard no evidence in support of the invalid aggravating circumstance that was not admissible to prove the elements of the crime. Submission of the felony murder aggravator to the jury exposed the sentencers to no evidence which they would not have properly heard at the guilt phase even if the State had not relied upon that aggravating circumstance. Under our statute and the federal constitution, the jury can properly consider evidence of the nature, facts and circumstances of the crime in making its

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[2] *See* Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 University of Chicago Law Review 740 (1987).

[3] *See supra* p. ___.

determination as to whether a sentence of death is warranted. *See* T.C.A. § 39-13-204(c) (formerly § 39-2-203(c)); *Clemons v. Mississippi*, 494 U.S. 738, 748 (1990). The evidence of the offense and its nature was thus properly before the jury at sentencing. Consequently, there was no inadmissible evidence that could have affected the jury's decision. The argument of the prosecutor regarding the invalid aggravating circumstance did not go beyond statements that were permissible with reference to the commission of the offense of which the defendant was convicted. As a result, the jury heard nothing that was not appropriate, except that numerically, there were two aggravating circumstances rather than one. Finding prejudicial error on this super-technical ground would require the absolute rejection of the principle of harmless error found in Rule 52 of the Tennessee Rules of Criminal Procedure and Rule 36(b) of the Tennessee Rules of Appellate Procedure. Where there was in fact error but, as in this case, the error *could not have affected the verdict* of the jury, it is appropriate to find the error was harmless beyond a reasonable doubt.

No issue is made of the aggravating circumstance found under T.C.A. § 39-13-204(i)(2). The record shows that the defendant's prior convictions supporting this aggravating circumstance were two convictions of armed robbery, one conviction of first degree murder and one conviction of attempt to commit first degree murder. The evidence in mitigation was meager. Accordingly, I concur that the record supports the jury's finding that the aggravating circumstance outweighed the mitigating circumstances and the imposition of the sentence of death.

COMPARATIVE PROPORTIONALITY REVIEW

The greatest deficiency in this case, and in the present death penalty law as applied in this state, is the total absence of a meaningful and exacting comparative proportionality review. Where the statute defining a capital offense does not accomplish narrowing, as the Tennessee statute does not, comparative proportionality analysis is a vital component in the constitutional imposition of the death penalty. *See Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 3058 (1990); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Pulley v. Harris*, 465 U.S. 37 (1984).

The comparative proportionality review in this case consisted of the conclusory statement, "Further, our comparative proportionality review reveals that the sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and character of the defendant." This statement is followed by citation to a series of other cases in which the death penalty was imposed. In addition to revealing the lack of any articulated standard for comparative proportionality review, *see State v. Harris*, 839 S.W.2d at 85 (Reid, C.J., dissenting), the court's opinion also reflects a basic misunderstanding of the purpose of such review. If the case under review is compared only with cases in which the defendant has been sentenced to death, as in the Court's opinion in this case, its similarity to cases in which the sentence of death was not imposed, and, thus, any disproportionality, could not be noted. To make this determination, the Court must also examine first degree murder cases in which the sentence of death is not imposed. Limiting review to those cases in which a sentence of death was given compares the case under

review only to the standard for death-eligibility as discussed in step one of the analysis. *Supra*, p. ___. The same observation was made in *State v. Middlebrooks:*

> The Court obviously has substituted for the proportionality review required at this third stage of the proceedings a finding that the proof shows the defendant to be a member of the death-eligible group which, under the federal constitution and the Tennessee statute, includes all cases in which the proof meets the threshold standard of reckless indifference. This practice is acknowledged by the statement in Justice Drowota's dissent that the death penalty is not disproportionate punishment so long as the reckless indifference standard of *Enmund* and *Tison* is met. Drowota, J., dissenting at 349. Consequently, the Court has not found the punishment disproportionate in *any* of the 84 cases in which the sentence of death has been imposed since 1977. This fact alone would suggest there has been no effective proportionality review on appeal.

840 S.W.2d at 355.

The need to look beyond cases in which the jury actually imposed a sentence of death in order to assure valid proportionality review is recognized in Rule 12 of the Supreme Court Rules. This Rule sets forth the information regarding the defendant and the offense furnished by the trial judge, on which this Court bases its comparative proportionality review. The Rule requires that the report be completed "in all first-degree murder cases in which *life imprisonment or a sentence of death is*

imposed." (Emphasis supplied.) It thus implicitly establishes *all* cases resulting in first degree murder convictions as the universe of cases to which this Court must look when determining whether a sentence of death is proportionate.[4] Regardless of whether, as some defendants have argued, Rule 12 provides an insufficient basis for the Court's comparative proportionality review under T.C.A. § 39-13-206(c)(1)(D) (Supp. 1991), the record shows that the majority has not in the present appeal followed the Rule. *Compare State v. Barber,* 753 S.W.2d 659, 664-665 (Tenn. 1988) (reviewing cases in which life imprisonment and sentences of death were imposed).

Another deficiency in the Court's comparative proportionality review is the absence of any process for

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[4] The question of an appropriate universe for comparative proportionality analysis in death penalty cases is thoroughly reviewed in *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059 (1992). While *Marshall* adopted a broader universe than that contained in Rule 12, some other jurisdictions have limited themselves to a review of cases resulting in first degree murder convictions. *See e.g., State v. Moore,* 210 Neb. 457, 316 N.W.2d 33, 44, *cert. denied,* 456 U.S. 984 (1982); *State v. Rupe,* 108 Wash. 2d 734, 743 P.2d 210, 229 (1987), *cert. denied,* 486 U.S. 1061 (1988).

I also note for comparison with the cursory comparative proportionality analysis applied in this case, the proportionality review procedures employed by the New Jersey Supreme Court in *Marshall* and by the courts of other states. *See, e.g., Dawson v. State,* 481 A.d [sic] 1078, 1109-1110 (Del. 1990), *vacated on other grounds,* ___ U.S. ___, 112 S. Ct. 1093 (1992); *Godfrey v. State,* 248 Ga. 616, 284 S.E.2d 422, 425 (1980); *State v. Cummings,* 323 N.C. 181, 372 S.E.2d 541, 551-553 (1988), *vacated on other grounds,* 494 U.S. 1021 (1990); *Commonwealth v. Frey,* 504 Pa. 428, 475 A.2d 700, 707-709, *cert. denied,* 469 U.S. 963 (1984); *State v. Rupe,* 743 P.2d at 228-230.

determining if geographic or racial patterns of charging and prosecuting capital cases demonstrate an arbitrary exercise of the prosecutorial function. The Court must respect the broad discretionary powers given prosecutors. However, the statutes and the constitution require consistency and reliability in the administration of capital punishment. *See Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982). That ultimate responsibility rests on the Court. Even though statistical information alone regarding the number of prosecutions in a county or judicial district may not be a reliable standard for determining that the death penalty is being arbitrarily and capriciously imposed, the court should collect and review that information which may demonstrate the need for the adoption of a procedure that would ensure the avoidance of any extraneous influences from the race, sex, or status of the defendant or victim, or the resources available to prosecute or defend a case.

An adequate structure for comparative proportionality review cannot be set forth in a dissent. It requires the formulation of standards and the implementation of procedures for collecting and comparing cases and can be accomplished only by action of the court.

Nevertheless, despite the deficiencies in the procedure and information available for a proper comparative proportionality review, comparison of the character of the defendant in this case and the nature of his crime, by any standard of analysis, would show that he is among the worst of the bad. From the opening lines of the proof, which is discussed in detail in the main opinion, the defendant is shown to possess the characteristics most repulsive to society's sense of decency, and most

destructive to the very fabric of society. His proclamation that he was "going down hard this time" and he would "be taking some people with him," evinces a total disrespect for life, his own and that of others, and an arrogant and callous defiance of an ordered society, made dangerous by a fatalistic eagerness for violence. The immediate and efficient procurement of the weapon shows a deliberate and deadly purpose. His quick, but calculated, use of the weapon against the stranger at the market demonstrates, in traditional legal language, a heart bent on fatal mischief.

The defendant's deification of the weapon as Jesus Christ exposed a consummate contempt for morality and a gratuitous defilement of the sacred. His utter immorality is matched by the efficient casualness of the murders, once to obtain $111.16 and again to obtain possession of a vehicle. The deliberateness of the murder of the market clerk, his reasoned purpose for the murder, and the enormity of his contempt for life, moral values and the divine are summed up in his statement to the witness Johnson, "Yeah, he wouldn't open the safe, so I told him I would introduce him to Jesus Christ." Even the cold pages of the record show the defendant to be the embodiment of the danger against which people are the most defenseless – deliberate but meaningless violence unmitigated by even the ordinary human frailties of anger, fear, jealousy, or greed.

The valid aggravating circumstance, the defendant's prior convictions of felonies involving violence to the person, T.C.A. § 39-13-204(i)(2), was compelling. It was shown that the defendant had been twice convicted of armed robbery. He also had been convicted of first degree

murder and attempted first degree murder. These violent felonies are among the most serious in any penal code and show the defendant's deliberately violent nature over an extended period of time. The record establishes beyond a reasonable doubt that, upon consideration of the defendant's background and character and the nature and circumstances of the crime, the defendant is among those most deserving of the ultimate sanction.

For the reasons stated in *State v. Black,* I renew the objection to electrocution as the means of executing the sentence of death; but, I do not consider that grounds for reversal of the sentence.

For these reasons, I concur in the Court's affirmance of the death penalty in this case.

/s/ Lyle Reid
Lyle Reid, C.J.

THE STATE OF TENNESSEE

I, SUE R. WALKER, Chief Deputy Clerk of the Supreme Court of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the

CONCURRING OPINION

.....

pronounced by said Court at its April Term, 1993, in the case of .....

STATE OF TENNESSEE

.....

..... against .....

MICHAEL WAYNE HOWELL

.....

..... as appears of record not on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the City of Jackson, on this the 10th day of November A.D., 1993.

/s/ Sue R. Walker
CHIEF DEPUTY CLERK

By_____D.C.